No. 87-732

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES E. WHEELER,
NORA WHEELER, and
SHARON K. MAY - - - - - Petitioners

versus

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 30, 1987

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QUESTIONS PRESENTED

1. Whether the Kentucky Billboard Act (KRS §§177.830-177.890) and implementing regulations (603 K.A.R. 3:010) violate the First and Fourteenth Amendment freedom of expression of individuals who use billboards to communicate political and religious beliefs.

2. Whether the Kentucky Billboard Act and implementing regulations violate the Fourteenth Amendment right to equal protection of the laws of individuals who use billboards to communicate political and religious beliefs.

3. Whether the decision below conflicts with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L.Ed. 2d 800, 101 S. Ct. 2882 (1981).

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JAMES E. WHEELER,
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SHARON K. MAY - - - - - *Petitioners*

v.

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, James E. Wheeler, Nora Wheeler, and Sharon K. May respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 22, 1987.

OPINIONS BELOW

On March 7, 1986 the United States District Court rendered its decision in which the Court invalidated the Kentucky billboard statute and regulations, concluding that they are violative of the Wheelers' right to freedom of expression under the First Amendment to the United States Constitution. A copy of the District Court's opinion appears in the Appendix hereto. The

opinion of the Court of Appeals also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 22, 1987. Subsequently on July 6, 1987, James Wheeler filed a Petition for Rehearing with the Court of Appeals which was denied on August 4, 1987. This petition for certiorari was filed within ninety (90) days from the date the Petition for Rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners James E. Wheeler, Nora Wheeler and Sharon K. May are Kentucky residents who were denied permission to erect a billboard on which they wished to communicate their political and religious ideas. (R. 186: *Nora Wheeler,* at T.R. 63-64; Sharon Kay May at T.R. 166-168). The site is located about 1000 feet south of the Jefferson County/Bullitt County line in Bullitt County, Kentucky. James and Nora Wheeler had been leasing the sign since 1964 for one dollar ($1.00) per year.

This action was brought by Petitioners in Federal District Court pursuant to 42 U.S.C. §1983 alleging denial of their rights to freedom of expression secured to them under the First and Fourteenth Amendments, United States Constitution and seeking a declaratory judgment under 28 U.S.C. §2201 that Kentucky Revised Statute 177.841 and Kentucky Administrative

Regulation 603 KAR 3:010 unconstitutionally deprive them of freedom of expression. The Wheelers further sought permanent injunctive relief prohibiting the Commissioner and the Commonwealth of Kentucky from enforcing the challenged statute and regulation, as well as monetary damages arising from the violation of their constitutional rights.

The U.S. Magistrate granted summary judgment in favor of the Wheelers on October 25, 1982. (R. 120: Summary Judgment). He declared KRS 177.841 and 603 KAR 3:010 to be unconstitutional in violation of the Wheeler's First and Fourteenth Amendment Rights. The Commissioner appealed the judgment to the United States Court of Appeals for the Sixth Circuit, which remanded the action to determine the actual effect of the Kentucky billboard statutes and regulations on the Wheeler's First Amendment rights and whether the effect of said statutes and regulations is the same or similar to the regulations invalidated in *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981).

On remand the U.S. Magistrate rendered his decision in which the Court invalidated the Kentucky billboard statute and regulations, concluding that they violate the First Amendment to the United States Constitution. He found that under the statute and regulations, signs advertising commercial activities would be allowed on the property but signs conveying many non-commercial messages (particularly those of religious, ideological, or political nature such as "Abor-

tion is Murder," "Save the Whales" and "No Nukes") would not be permitted.

The Commissioner once again appealed to the Sixth Circuit. The Court reversed the judgment of the District Court. It ruled that the Billboard Act and regulations are content neutral, narrowly tailored to serve substantial state interests, and do not effectively deny the First and Fourteenth Amendment rights of the Wheelers. A copy of the decision of the Circuit Court is attached in the Appendix.

REASONS FOR GRANTING THE WRIT

1. The Case Involves Important Unresolved Issues of the First and Fourteenth Amendment Rights of Freedom of Expression for Individuals Using Billboards for the Communication of Political and Religious Beliefs.

After a trial which was the culmination of twelve years of litigation, the United States District Court for the Eastern District of Kentucky held that portions of Kentucky's statutes and administrative regulations are constitutionally defective because they effectively prohibited the utilization of the only media financially available to the Plaintiffs to communicate their views to large numbers of their fellow citizens. The District Court Magistrate also found that the statutes and regulations in question "make distinctions based on the content of signs" and hence offended the Constitution of the United States.[1]

The Circuit Court held that the Kentucky Billboard Act, Ky. Rev. Stat. Ann. §§177.830-177.890 (Baldwin

[1]See District Court Memorandum Opinion at Appendix B, *infra*.

1985)[2] and the Kentucky regulations implementing this statute, 603 Ky. Admin. Regs. 3:010 (1975)[3] are content neutral, narrowly tailored to serve substantial state interests and not unconstitutional.[4]

However, as found by the trial court, the facts set forth in the record clearly demonstrate that the statutes and regulations as applied regulate the *content* of the messages. The statutes unconstitutionally empower state authorities to distinguish between various communicative interests in the area of non-commercial speech *and* prefer commercial speech over non-commercial speech.

Thus, 603 KAR 3:020, §§2(26) and 8 contains an exception to the "on site" advertising requirement. Certain national, regional, or local religious or non-profit organizations may advertise their activities on billboards even though they do *not* have such activities on site.

Moreover, Mr. George Lovell, the Assistant District Permits Officer for the Kentucky Department of Highways testified at the trial that it is the Kentucky Highway Department which determines what constitutes a national, regional, or local religious or non-profit organization and whether the message is appropriate. (R. 186: *George Lovell,* at T.R. 143, 160-161).

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[2]The relevant Kentucky statutes are set forth in Appendix B, *infra.*

[3]The relevant Kentucky administration regulations are set forth in Appendix B, *infra.*

[4]See Appeals Court Decision at Appendix A, *infra.*

Even more significantly, 603 KAR 3:010, §2(3) defines "on premise" advertising device as those devices that contain "a message relating to an activity or the sale of a product on the property on which they are located." Therefore, important political, ideological, and religious messages such as "NO NUKES," "ABORTION IS MURDER," and "SAVE THE WHALES" are not permitted. Billboard Permit Officer George Lovell testified that *"non-commercial activities"* would be permitted to be 'advertised' only if the activities actually occurred on the premises and that the only reason the Wheelers were not granted a permit for the site in question "is the message that the Wheelers sought to convey." (R. 186: *George Lovell,* at T.R. 124, 130-131).

Mrs. Nora Wheeler and her daughter, Sharon Kay wanted to display a picture and message on the billboard hereinbefore mentioned against compulsory school busing. In 1974 Sharon Wheeler went to the Department of Highways district office in Louisville to apply for a permit. State officials there told her that she would never be granted a permit for a sign at the Bullitt County site; and the State official with whom she talked, Mr. Gene Teague, said *"I know whose daughter you are and you won't get a permit for any sign and I know what sign you're talking about, and there won't be permits for that sign."* (T.R. 168, emphasis supplied).

Based upon the testimony of Mr. Lovell and Sharon Wheeler, it is abundantly clear that the Kentucky

Highway Department is making content-based determinations as to which signs are permissible and which are not. They are preferring certain kinds of non-commercial speech over the Wheelers' political and religious communications. They are also preferring commercial speech over the Wheelers' non-commercial speech. Preferring commercial speech over non-commercial religious and political speech is a peculiar inversion which destroys the basic purpose of the First Amendment and violates a long line of precedents of the United States Supreme Court. Such conduct on the part of state officials violates the First and Fourteenth Amendment rights of the Wheelers to freedom of expression. *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490 (1981); *John Donnelly and Sons* v. *Campbell,* 639 F. 2d 6 (1980); aff'd. 453 U. S. 916 (1981).

In addition, the restrictions on non-commercial speech of the Kentucky statutes and regulations are *not* valid time, place, and manner restrictions because they regulate the *content* of the signs. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976); *Consolidated Edison Company* v. *Public Service Commission,* 447 U. S. 530 (1980).

Consequently, the Circuit Court's decision not only deprives the Wheelers as individuals of their freedom of expression under the First and Fourteenth Amendments. It also places in jeopardy the same rights of all residents of Kentucky (and states with similar laws) who seek to use billboards as a medium of expression for their political and religious beliefs.

2. The Case Involves Important Unresolved Issues Concerning the Fourteenth Amendment Right to Equal Protection of the Laws for Individuals Holding Certain Political and Religious Beliefs.

As applied to Petitioners, the Kentucky Billboard Act and regulations implementing the statute create an invidious distinction and discrimination without a rational basis. State Highway Officials single out certain individuals who hold views they do not like, such as the Wheelers who wish to express their ideological and political opposition to forced busing. (R. 186: *Nora Wheeler,* at T.R. 60-62). The testimony of Sharon Kay makes it plain that Gene Teague of the Highway Department denied her the right to use the billboard because of who she was and the content of her message. Further, Permit Officer George Lovell conceded at the trial that under the billboard laws as applied, the Highway Department permits certain "national, regional, or local religious or non-profit groups" to communicate messages on a billboard or sign without regard to on-site activities, but denies the Wheelers the right to communicate the very same message. (R. 186: *George Lovell,* at T.R. 141-142).

Such conduct by Kentucky Highway officials constitutes purposeful and intentional discrimination and denies the Wheelers their right to equal protection of the laws. *Cordeco Development Corp.* v. *Santiago Vasquez,* 539 F. 2d 256 (1976), cert. den. 429 U. S. 978 (1977). In addition, it leaves unresolved the rights of all Kentucky residents (and residents of other states with similar laws) who wish to express on billboards

religious, political, and ideological views of which officials of the state highway department disapprove. The impact of the Sixth Circuit's decision is far-reaching.

Furthermore, the decision has the effect of discrimination without a rational basis against the poor or disadvantaged, such as the Wheelers. The factual record below demonstrates that the Wheelers do not have adequate economic means to use alternative methods of communication such as radio or television or to rent other signs in other locations. (R. 186: *James E. Wheeler,* at T.R. 25-27, *Nora Wheeler,* at T.R. 63-4, *Sharon K. May,* at T.R. 168-169). Therefore, the Circuit Court decision takes away from the poor one of the last reasonably priced means of expressing their religious and political beliefs.

3. The Case Involves an Important, Direct and Unresolved Conflict With the Decision of The United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

The decision of the Circuit Court below conflicts directly with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). In *Metromedia,* the City of San Diego adopted an ordinance governing outdoor advertising. The ordinance permitted onsite commercial advertising but prohibited other commercial advertising and non-commercial communications using fixed structure signs (i.e. billboards), unless permitted by one of the specified exceptions. The exceptions included government signs;

religious symbols; temporary political campaign signs and others. (453 U. S. at 495-496) The Court described the effect of the ordinance:

> . . . (T)he occupant of property may advertise his own goods and services; he may not advertise the goods or services of others, nor may he display most non-commercial messages. (453 U. S. at 503).

The effect of the ordinance was to discriminate against non-commercial speech and to prefer commercial speech over it. Speaking for the plurality in *Metromedia,* Justice White cited the case of *John Donnelly and Sons* v. *Campbell,* 639 F. 2d 6 (1980), aff'd. 453 U. S. 916 (1981), with approval and stated as follows (453 U. S. 513 at footnote 18):

> That court took a position very similar to the one we take today: It sustained the regulation insofar as it restricted commercial advertising, but held unconstitutional its more intrusive restrictions on non-commercial speech. The court stated: "The law thus impacts more heavily on ideological and non-commercial speech—a peculiar inversion of First Amendment values. The statute . . . provides greater restrictions—and fewer alternatives, the other side of the coin—for ideological than for commercial speech . . . In short, the statutes' impositions are both legally and practically the most burdensome on ideological speech where they should be the least.

The Kentucky statutes and regulations, as applied, in essence are the same as the San Diego ordinance in *Metromedia.* Under both regulatory schemes the law

restricts the use of certain kinds of outdoor signs in two ways: 1) by reference to the sign's structural characteristics, and 2) by reference to the *content* or message, of the sign. *Metromedia, supra,* at 503.

The Circuit Court below wrongly concludes (Decision filed June 22, 1987, No. 86-5423 at page 8, See Appendix):

> We believe that the Billboard Act and regulations are content neutral. They are not directed at the content of the messages but their secondary effects.

The trial testimony of Billboard Permit Officer George Lovell directly refutes this finding of the Circuit Court. The record reads as follows (T.R. 130-131):

> Q. 5. So, the only problem with giving a permit for the Wheeler sign, is the message the Wheelers sought to convey, is that an appropriate statement?
>
> A. Right. Yes, sir.

See also testimony of George Lovell at T.R. 134-136 and 160-161. Therefore, the Circuit Court decision in the instant action is in direct conflict with the *Metromedia* decision and the situation requires Supreme Court review.

CONCLUSION

For all the foregoing reasons stated hereinbefore, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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October 30, 1987

APPENDIX

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES E. WHEELER,
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SHARON K. MAY - - - - - - - *Petitioners*

v.

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - - *Respondent*

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1987, three copies of the Petition for Writ of Certiorari each were mailed postage prepaid to Hon. William H. Wallace, Counsel for Respondent, Department of Highways, Commonwealth of Kentucky, P.O. 37090, Louisville, Kentucky 40233; Richard K. Willard, Assistant Attorney General, Louis G. De Falaise, United States Attorney, John F. Cordes, John F. Daly, Attorneys, Appellate Staff Civil Division, Room 3631, Department of Justice, Washington, D.C. 20530; and Bert T. Combs, Sheryl G. Snyder, William H. Hollander, Wyatt, Tarrant, and Combs, Counsel for Outdoor Advertising Association of Kentucky, Incorporated, Citizens Plaza, Louisville, Kentucky 40202. I further certify that all parties required to be served have been served.

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

No. 86-5423

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. WHEELER, NORA L. WHEELER, and SHARON CARMICHAEL, - - *Plaintiffs-Appellees,*

v.

COMMISSIONER OF HIGHWAYS, COMMONWEALTH OF KENTUCKY - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed June 22, 1987

Before: KENNEDY, RYAN and NORRIS, Circuit Judges.

KENNEDY, Circuit Judge. Appellees challenged the constitutionality, on first and fourteenth amendment grounds, of the Kentucky Billboard Act, Ky. Rev. Stat. Ann. §§ 177.830-177.890 (Baldwin 1985) ("Billboard Act"), and the Kentucky regulations implementing this statute. 603 Ky. Admin. Regs. 3:010 (1975). The District Court held that the Billboard Act and regulations were unconstitutional on their face because they discriminated against non-commercial speech in favor of commercial speech. The Kentucky Commissioner of Highways ("Commissioner") appeals ar-

guing that the statute and regulations are content neutral and narrowly tailored to serve substantial state interests. We agree and reverse.

The Billboard Act prohibits the erection or maintenance of any "advertising device" on private property within 660 feet of the right of way of any interstate highway or federal-aid primary highway. Ky. Rev. Stat. Ann. § 177.841 (1).[1] Violations of the Billboard Act are declared to be a public nuisance authorizing an employee or officer of the Kentucky Bureau of Highways to remove the device without notice. *Id.* § 177.870. The express purpose of the Billboard Act is to provide for maximum visibility along affected highways, to prevent unreasonable distraction of operators of motor vehicles, to prevent interference with the effectiveness of traffic lights, signs or signals, to preserve and enhance the natural and scenic beauty or aesthetic features of the affected highways, and to promote the safety and comfort of the users of such highways. *Id.* § 177.850. Section 177.860 contains an exception to the general prohibition. It provides that devices erected or maintained on the property for the purpose of indicating the name and address of the owner, lessee, or occupant of the property, the name or type of business or profession conducted on such property, information required or authorized by law to be displayed on the property, devices advertising the sale or lease of the property on which it is placed, devices complying with applicable commercial or industrial zon-

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[1]The Billboard Act also prohibits the erection of any advertising device located outside of an urban area and beyond 660 feet of the right of way that is "legible and/or identifiable" from any interstate or federal-aid primary highway. Ky. Rev. Stat. Ann. § 177.841(2). Directional and official signs, signs advertising the sale or lease of property on which they are located, and signs advertising activities conducted on the property upon which they are located are exempt from this prohibition.

ing ordinances, and devices providing directional information for businesses offering goods and services of interest to the traveling public, do not violate section 177.851.[2]

In addition to containing the general prohibitions found in the Billboard Act, the regulations promulgated by the Kentucky Department of Transportation spell out the permissible limits for on-premises signs in protected areas. On-premises signs are permitted and include signs defined in section 177.860 and signs "that contain a message relating to an activity or the sale of a product on the property on which they are located." 603 Ky. Admin. Regs. 3:010, § 2(3)(1975). The regulations also regulate the size and spacing of on-premises signs.[3] "Billboards," defined as "devices that contain a message relating to an activity or product that is foreign to the site on which the device and message is located. . . ." *id.* § 2(2), are prohibited in all protected areas,[4] except for areas zoned commercial or industrial prior to September 21, 1959. There, "billboards" or off-premises signs are allowed subject to size and spacing restrictions. Id. § 5.

The Billboard Act and regulations were adopted in response to the federal Highway Beautification Act of 1965. 23 U.S.C. §§ 131-136 (1982 & Supp. 1987) ("Act"). This Act provides for the regulation and control of outdoor ad-

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[2]Section 177.860 also authorizes the Commissioner to prescribe by regulations reasonable standards for the advertising devices exempt from section 177.841.

[3]The regulations specify that on-premise advertising devices may not advertise items incidental to the primary activity conducted on the property. For example, a supermarket may not advertise on its on-premise sign the products it sells.

[4]The regulations permit off-premise signs in urban areas if they are more than 660 feet from the highway. In non-urban areas, off-premises signs are prohibited if "legible an/or identifiable" from the highway.

vertising devices adjacent to interstate and federal-aid primary highways. Its purpose is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." *Id.* § 131(a). The Act requires each state participating in the highway beautification program to exercise "effective control" over outdoor advertising. It prohibits advertising devices located within 660 feet of the interstate or federal-aid primary highway, or if located outside urban areas, such devices are prohibited beyond 660 feet if visible from the highway. "Effective control" means that signs, displays, or devices within the prescribed area shall be limited to directional and official signs, signs advertising the sale or lease of property on which they are located, signs advertising activities conducted on the property on which they are located, signs of historic or artistic significance, and signs advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the interstate or primary system. *Id.* § 131(c) (Supp. 1987). The penalty for not complying with the Act is the forfeiture of ten percent of the state's federal highway funds until such time as the state provides for effective control. *Id.* § 131(b).

The Commissioner refused to grant appellees a permit to display a political or religious message on a billboard located one foot from the right of way fence in Bullitt County, Kentucky, adjacent to Interstate Highway 65. The area was not zoned industrial or commercial prior to September 21, 1959, and the proposed sign would not qualify as an on-premise sign. It does not appear that any activity was conducted on the portion of the property where the sign was to be placed. Consequently, appellees sought an injunction against the enforcement of the Billboard Act based on allegations of its discriminatory and ad hoc en-

forcement. In an amended complaint, appellees added federal officials as defendants and challenged the constitutionality of the Billboard Act and regulations, and the federal regulations implementing the Act. Appellees also sought damages arising from the violation of their constitutional rights. By stipulation, the case was assigned to a magistrate for trial. The magistrate dismissed the case as to the federal defendants and declined to award damages, concluding that such an award would violate the eleventh amendment. However, the magistrate entered summary judgment for appellees against the Commissioner. The Commissioner appealed. We concluded that the factual stipulations were unclear; the magistrate had failed to make an adequate recital of the uncontested facts on which he relied or make clear the legal basis for his decision. We remanded the action for clarification of the holding. After remand, the magistrate held the Billboard Act and regulations unconstitutional on their face because they prohibit signs with ideological messages in areas where "on-premises" commercial or other activities could be advertised.[5] This appeal followed.

The Commissioner contends that the Billboard Act and regulations are a valid time, place, and manner restriction on appellees' first amendment rights because they are not aimed at the messages that appellees seek to display but at the "secondary effects" of advertising devices including their detrimental effects on highway scenic beauty. The Commissioner argues that the Supreme Court's decision in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490

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[5]The magistrate recognized that signs advertising noncommercial activities would be allowed if those activities were being conducted on the property. However, the magistrate concluded that messages such "Abortion is Murder," "Save the Whales," and "No Nukes" would not be permitted.

(1981), does not apply because the restrictions are content neutral: they do not distinguish between commercial and non-commercial messages, as was the case with the ordinance in *Metromedia,* because the restrictions apply to all messages irrespective of content. Furthermore, the Commissioner argues that the restrictions are narrowly tailored to serve substantial state interests — aesthetics and highway safety — and that the restrictions leave ample alternative areas for communication through the use of billboards, i.e., areas zoned commercial or industrial along interstate and federal aid primary highways as well as areas adjacent to other streets and highways. Appellees, on the other hand, contend that the restrictions violate the first amendment because they define what is permissible based on the content of the message: signs advertising a business or activity located on the property are permitted while a sign of the same size advertising a business or activity off-site is prohibited. Although appellees recognize that the regulations permit non-commercial messages relating to an activity on-site, they contend that the inherent limitations on an activity preclude many ideological, political, and religious ideas. Thus, appellees argue that the Billboard Act and regulations are invalid under *Metromedia.* Furthermore, appellees contend that even if the restrictions are content neutral, no adequate alternative means of communication are reasonably available.

I.

The Supreme Court has recognized that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner. *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 425 U. S. 640 (1981). Expression, whether oral or written, is subject to reasonable time, place and manner restrictions.

Clark v. *Community For Creative Non-Violence*, 468 U. S. 288, 293 (1984). Such restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and they leave open ample alternative channels for communication of the information. *Id. Accord Members of the City Council* v. *Taxpayers for Vincent*, 466 U. S. 789, 807 (1984); *Heffron*, 452 U. S. at 647-48.

II.

We believe that the statute and regulations in the present case are valid place and manner restrictions. The statute and regulations subject on-premises signs adjacent to interstate highways to size and spacing restrictions. The statute and regulations also prohibit all off-premises signs containing any message in protected areas adjacent to interstate highways. The regulations permit off-premises signs in urban areas if the sign is more that 660 feet from the interstate highway. Additionally, they permit off-premises signs in areas adjacent to the interstate or federal aid primary highways which were zoned commercial or industrial prior to September 21, 1959. These permissible off-premises signs are also subject to size and spacing restrictions. It is apparent from the express purpose and effect of the Billboard Act that the restrictions on the location of off-premises signs regulate the secondary effects, not the content of these signs.

The Supreme Court has recently considered the validity of a restriction designed to regulate the secondary effects of protected speech. In *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), the Court considered a challenge to a zoning ordinance that prohibited adult theaters from locating within 1000 feet of any residential zone,

single- or multiple-family dwelling, church, park, or school. The Court noted that the ordinance treated theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, the Court noted that the ordinance was not aimed at the content of the films shown, but rather at the secondary effects of such theaters on the nearby community. *Id.* at 929. Accordingly, the Court found that the ordinance was consistent with its definition of "content-neutral" speech because it was justified without reference to the content of the speech, and stated:

> The ordinance does not contravene the fundamental principal that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Id. at 929 (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972)).[6]

In *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court considered a rule promulgated by a public corporation that required all persons desiring to sell, exhibit, or distribute materials during the state fair to do so only from fixed locations. The Court concluded that the restriction was content neutral and a reasonable restriction on place and manner because it applied evenhandedly to all persons or organiza-

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[6]The *City of Renton* Court relied on *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), where the Court concluded that zoning ordinances designed to combat undesirable secondary effects of adult theaters are to be reviewed under the standards relating to content neutral time, place, and manner regulations. The Court held that the City of Detroit could distinguish between adult theaters and other kinds of theaters because it was not regulating the dissemination of "offensive" speech. *Id.* at 71.

tions, whether commercial or charitable, who wish to distribute and sell written materials or to solicit funds. *Id.* at 655.

We believe that the Billboard Act and regulations are content neutral. They are not directed at the content of the messages, but at their secondary effects. The restrictions permit commercial and non-commercial signs in protected areas as long as the signs relate to an activity on the premises. Messages such as "Abortion is Murder," or "No Nukes" are permissible if an activity related to the message is conducted on the premises. Like the restrictions in *Heffron,* the Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no viewpoint or subject matter. Furthermore, commercial and non-commercial messages are treated alike in urban areas and areas zoned commercial or industrial prior to September 21, 1959.

The Washington Supreme Court reached a similar conclusion with respect to a statute much like the statute and regulations in the present case. In *State* v. *Lotze,* 92 Wash. 2d 52, 593 P. 2d 811, *appeal dismissed,* 444 U.S. 921 (1979), the state sought an order for removal of billboards from defendant's property. The applicable statute prohibited signs visible from an interstate, primary, or scenic highway. Excepted from this general prohibition were directional or other official signs required or authorized by law, signs advertising the sale or lease of property on which they were located, and signs advertising activities conducted on the property on which they were located. Such signs were permissible within view of a scenic highway subject to size, location, and number restrictions. The statute also permitted signs adjacent to highways in commercial or industrial areas subject to size and spacing restrictions. The court, recognizing that a total ban of on-premises signs may violate the first amendment, con-

cluded that the statutory scheme was content neutral and constituted a valid place and manner limitation on speech. 92 Wash. 2d at 59, 593 P. 2d at 815.

Furthermore, the on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property. In *Linmark Assocs., Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), the Court considered an ordinance that prohibited the posting of "For Sale" signs or "Sold" signs because the township sought to abate the flight of white homeowners from a racially integrated community. The ordinance did not prohibit other types of signs. The Court found the ordinance unconstitutional because the township enacted the ordinance to prevent its residents from obtaining certain information. *Id.* at 96.[7] The Court emphasized that because the township did not prohibit all lawn signs, "the . . . ordinance is not genuinely concerned with the place of the speech—front lawns . . . ." *Id.* at 93. Additionally, the Court noted that the "township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values . . . ." *Id.*

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[7]According to the Court, "The Council has sought to restrict the free flow of [the information relating to home sales] because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town." *Linmark,* 431 U. S. at 96.

Unlike the ordinance in *Linmark*, the Billboard Act and regulations are concerned with the place of the signs and the promotion of aesthetic values. The Kentucky legislature enacted the statute in part "[t]o preserve and enhance the natural scenic beauty or the aesthetic features of . . . interstate highways . . . ." Ky. Rev. Stat. Ann. § 177.850(4).[8] Kentucky has prohibited all off-premises signs in non-urban areas and areas not zoned industrial or commercial prior to September 21, 1959. The exception for on-premises signs recognizes the important function of these signs and was not enacted to prevent the citizens of Kentucky from receiving certain information.[9] *See State* v. *Hopf*, 323 N.W. 2d 746 (Minn. 1982) (on-premise sign is part of business

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[8]The federal government, as *amicus* in the present case, correctly points out that the Supreme Court in *Heffron* upheld an off-site/on-site distinction. As discussed above, the Court upheld a state fair rule restricting in-person sales, solicitations of funds, and the distribution of materials to booths. Any group wishing to engage in this type of speech had to acquire a "premises" at the fair. The Court did not find that this restriction amounted to a regulation of content because it discriminated against no viewpoint or subject matter, but regulated the location of various activities in an evenhanded way. *Heffron*, 452 U. S. at 648-49.

[9]The Supreme Court in *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U. S. 530 (1980), struck down a content-based distinction. There, the Court concluded that defendant could not prohibit public utilities from including in their monthly bills inserts discussing the benefits of nuclear power while permitting inserts discussing other issues. *Id.* at 537. According to the Court, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* Unlike the restrictions in *Consolidated Edison*, the Billboard Act and regulations do not regulate the content of proposed messages because they do not seek to regulate the viewpoint or subject-matter of an advertisement, or prohibit public discussion of an entire topic.

itself and state, by prohibiting off-premises signs within 100 feet of a church or school, did not favor one message over another).

Appellees in the present case rely on the Supreme Court's decision in *Metromedia Inc.* v. *City of San Diego*, 453 U.S. 490 (1981). There, the Court considered the constitutionality of a San Diego ordinance that banned all outdoor advertising devices, unless authorized by one of the specified exceptions. These exceptions included signs identifying the premises on which the sign was located or signs advertising goods produced or services rendered on the premises. The exceptions also included religious symbols, commemorative plaques of recognized historical societies, signs carrying news items or telling the time or temperature, signs erected in the discharge of any governmental function, or temporary political campaign signs. A majority of the Court recognized that the city had legitimate interests in controlling the non-communicative aspects of billboards, but found the ordinance unconstitutional on its face.

Writing for the plurality, Justice White found the ordinance constitutional insofar as it restricted commercial advertising to on-site advertising, but stated:

> There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry non-commercial messages is generally prohibited. . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a

> particular site is of greater value than the communication of non-commercial messages.

Metromedia, 453 U.S. at 513. With respect to the limited exceptions for certain non-commercial advertisements, the plurality stated that the ordinance favored certain categories of non-commercial speech over others. According to the plurality, "[w]ith respect to non-commercial speech, the city may not choose the appropriate subjects for public discourse . . . ." *Id.* at 515.[10] Thus, the plurality concluded that the city had regulated impermissibly the content of non-commercial speech. Id. at 515.[11]

Justice Brennan, with whom Justice Blackman joined, concurred in the judgment. Justice Brennan believed that the ordinance constituted a total ban of billboards, and the city had failed to justify this total restriction. The city failed to show, for example, that banning billboards actually furthered traffic safety and that billboards presented more

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[10]The plurality noted: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Metromedia,* 453 U. S. at 515 (quoting *Consolidated Edison Co.* v. *Public Serv. Comm'n,* 447 U. S. 530, 538 (1980)).

[11]The plurality in *Metromedia* did not consider the constitutionality of the Highway Beautification Act which, like the regulations implementing the Billboard Act, does not contain a total prohibition of non-commercial signs in areas adjacent to the interstate and federal-aid primary highways. The plurality noted:

> As far as the Federal Government is concerned, such billboards are permitted adjacent to the highways in areas zoned industrial or commercial under state law or in unzoned commercial or industrial areas. 23 U.S.C. § 131(d). Regulation of billboards in those areas is left primarily to the States. For this reason, the decision today does not determine the constitutionality of the federal statute.

Metromedia, 453 U. S. at 515 n.20.

substantial aesthetic problems than other permitted uses. *Id.* at 528-30. Although not deciding whether the exceptions to the total ban constituted an independent basis for invalidating the ordinance, Justice Brennan disagreed with the plurality's characterization of the exceptions in the ordinance for non-commercial speech. He concluded that the ordinance would permit non-commercial advertisements if the owner or occupant is an enterprise usually associated with non-commercial speech. *Id.* at 536.

Unlike the restriction at issue in *Metromedia,* the on-premises exception in the present case is not limited to commercial speech: the on-site exception can be applied to any topic, commercial or non-commercial. Additionally, unlike the ordinance in *Metromedia,* the exceptions in the Kentucky statute and regulations for non-commercial speech are not limited to political advertisements, commemorative plaques, or religious symbols. The restrictions permit any non-commercial signs as long as they relate to an activity on the premises. The magistrate failed to recognize that messages such as "Abortion is Murder" or "No Nukes" are permissible as long as an activity related to the message is conducted on the property.

Appellees in the present case also rely on several cases construing similar state statutes or local ordinances in support of their proposition that the Billboard Act and regulations are unconstitutional. In *John Donnelly & Sons* v. *Campbell,* 639 F. 2d 6 (1st Cir. 1980), *aff'd,* 453 U.S. 916 (1981), plaintiffs challenged the constitutionality of the Maine Traveler Information Services Act. Me. Rev. Stat. Ann. tit. 23, §§ 1901-1925 (1980 & Supp. 1986). The statute prohibited the erection or maintenance of signs, subject to certain exceptions. These exceptions included signs of a governmental body, signs identifying stops or fare zones of motor buses, signs showing the place and time of church and civic organization meetings, signs announcing fairs and

exhibitions within the county, signs announcing nonprofit historical and cultural institutions, temporary political signs, and signs located on common carriers and inspected motor vehicles. Plaintiffs argued, *inter alia*, that some of the exceptions to the general prohibition depend on the message conveyed; consequently, the statute was directed toward the content of the messages on the signs. Nevertheless, the court concluded that the statute, generally, was content neutral and prohibited billboards not because of their messages, "but because the medium itself is objectionable." 639 F. 2d at 8. The court found the statute unconstitutional, however, because of its effect on non-commercial speech.[12] The court noted that the statute permitted some types of on-premises signs relating to non-commercial activities but concluded that these exceptions did not go far enough. *Id.* at 15. The court construed the on-premise exception as not permitting messages such as "Abortion is Murder" or "Save the Whales," and found that the statute impacted more heavily on ideological than on commercial speech.

In *Matthews* v. *Town of Needham*, 764 F. 2d 58 (1st Cir. 1985), residents of Needham challenged the validity of a bylaw barring the posting of almost all off-premises signs. Certain types of signs were exempt from this general prohibition but the exception did not permit political signs, even though "For Sale" signs, professional office signs, and signs erected for religious or charitable causes were permitted. The court held the bylaw unconstitutional because it was concerned with the content, not the time, place, or manner of the speech. *Id.* at 60. Similarly, in *Metromedia, Inc.* v. *Mayor & City Council*, 538 F. Supp. 1183 (D. Md.

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[12]The court stated that the statute was valid with respect to its effect on commercial speech. *John Donnelly & Sons*, 639 F. 2d at 15.

1982), plaintiff challenged a city ordinance that contained restrictions on the kind and size of on-premises advertising signs permitted in a certain area of the city and prohibited in all off-premises signs in this area. The court, relying on the Supreme Court's decision in *Metromedia,* found the statute unconstitutional because the ordinance did not treat commercial and non-commercial speech equally. *Id.* at 1187. According to the court, the ordinance permitted an owner or occupier of land within the affected area to affix a sign identifying the premises, but prohibited signs displaying messages other than identification of the premises. *See also State* v. *Miller,* 83 N.J. 402, 416 A. 2d 821 (1980) (ordinance invalid where it prohibited signs relating to political speech while allowing "For Sale" signs and signs identifying churches, schools, parks, and signs erected by federal, state or local government); *Norton Outdoor Advertising, Inc.* v. *Village of Arlington Heights,* 69 Ohio St. 2d 539, 433 N.E. 2d 198 (1982) (ordinance restricting billboard advertising to product sold or business conducted on premises held unconstitutional because it excluded all non-commercial messages).

In the present case, the Billboard Act and regulations permit on-premises signs relating to an activity conducted on the site on which the sign is located. Messages such as "Abortion is Murder," "Save the Whales," or "George Wallace For President" are permitted in non-urban areas and areas not zoned industrial or commercial before September 21, 1959 as long as an activity relating to the message is being conducted on the premises. Non-commercial and commercial speech are treated alike. The restrictions do not limit non-commercial signs to signs advertising churches and civic organizations or commercial activities as in *John Donnelly & Sons, Matthews,* and *Mayor & City Council.*

III.

The next question this Court must consider is whether the Billboard Act and regulations are narrowly tailored to serve substantial governmental interests. As discussed above, the Billboard Act was enacted to provide for maximum visibility and safety along affected highways, and to preserve and enhance the scenic beauty or aesthetic features of such highways. Ky. Rev. Stat. Ann. § 177.850. The U.S. Supreme Court has in several instances concluded that such interests are substantial and justify a content neutral restriction on expression.

All of the Justices in *Metromedia* recognized the importance of the safety and aesthetic considerations that gave rise to the San Diego ordinance. Furthermore, seven Justices would have found those interests sufficient to justify a content neutral ban on off-premises commercial signs. 453 U.S. at 508-511 (opinion of White, J., joined by Stewart, Marshall, Powell, J.J.); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-61 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).[13] A majority of the Court in *Taxpayers for Vincent*, 466 U.S. 789 (1984), reaffirmed this conclusion and found that these interests justified an ordinance that prohibited the attachment of *all* signs to utility poles. The Court concluded that the city's interests in advancing aesthetic values, minimizing traffic hazards, and preventing interference with the intended use of public property were substantial. According to the *Taxpayers for Vincent* Court: "The problem addressed by this ordinance—

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[13]The plurality noted the meager record on the issue of whether the ordinance furthered the city's interests in traffic safety and aesthetics. Nevertheless, deferring to the judgments of local lawmakers, the plurality agreed with the California Supreme Court's conclusion that as a matter of law, the ordinance reasonably related to these interests.

the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit." *Id.* at 807.

More recently, in *City of Renton,* 106 S. Ct. 925 (1986), the Court concluded that the city's interest in attempting to preserve the quality of urban life was sufficient to justify an ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Id.* at 930. Rejecting the argument that the city must rely on studies specifically relating to the city's problems, the Court stated that "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *id.* at 931, such interests are sufficient to support the restriction. *See also John Donnelly & Sons,* 639 F. 2d 6 (1st Cir. 1980) (court took judicial notice that statute prohibiting erection and maintenance of most off-premises signs advanced substantial state interest in aesthetics and tourism); *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County,* 425 F. 2d 1141 (5th Cir.) (court found ordinance prohibiting all off-premises signs within 200 feet of expressway and regulating their size and spacing within 660 feet of expressway supported by county's substantial interest in promoting highway safety and aesthetics), *cert. dismissed,* 400 U. S. 805 (1970)).

Although the record in the present case contains little evidence regarding Kentucky's interests in traffic safety, we conclude that the interest in promoting the recreational value of public travel and preserving natural beauty along interstate highways is substantial and sufficient to support the content neutral restrictions. *Accord John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd.,* 369 Mass. 206, 339 N. E. 2d 709 (1979) (bylaw enacted solely for aesthetic

reasons supported content neutral ban on most off-premises signs); *Cf. John Donnelly & Sons,* 639 F. 2d at 12-13.

Kentucky's restrictions are also narrowly tailored to achieve this interest. The Supreme Court has held that a content neutral time, place, and manner restriction must be upheld unless it "is substantially broader than necessary to protect the [state's] interest. . . ." *Taxpayers for Vincent,* 466 U. S. at 808. There, the Court rejected the argument that the city's interest in aesthetics could not support a ban on signs on utility poles because the city did not ban signs wherever they might be located. The Court emphasized that a partial content neutral ban may nonetheless enhance the city's appearance.[14] *Id.* at 811.[15]

Appellees do not contend that restrictions could be more narrowly tailored to serve Kentucky's interest in preserving the natural beauty of its interstate highways. Moreover, the exception for on-site messages and off-site messages in areas zoned commercial or industrial prior to 1959 does not invalidate Kentucky's substantial interest in aesthetics. The addition of a sign on an existing building or in an area zoned industrial or commercial is only incremental damage to the environment; a sign erected on a site with no buildings creates a new insult to the countryside. "Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the [state's] appearance." *Taxpayers for Vincent,* 466 U. S. at 811.

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[14]The Court also noted that by not extending the ban to all locations, the city preserved a significant opportunity to communicate.

[15]In *Metromedia,* the plurality concluded that the city did not defeat its interest in traffic safety and aesthetics by permitting on-premises advertising and other specified signs. According to the plurality, "the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." *Metromedia,* 453 U.S. at 511.

See, e.g. John Donnelly & Sons, 639 F. 2d at 12-13 (on-premises signs are least aesthetically offensive because a structure has already violated the landscape); *E. B. Elliott Advertising Co.,* 425 F. 2d at 1151 (fact that ordinance prohibits commercial advertising signs in industrial and commercial areas while permitting point of sale signs does not destroy its reasonable relationship to constitutionally permissible objectives). By restricting the exception for on-premises signs to the activities carried on at the premises, the regulatory scheme reduces the number of such on-premises signs to those where the activity needs a sign. It is doesn't, then there will be that many fewer signs.

IV.

The final consideration in evaluating a time, place, or manner restriction is whether the restriction "leaves[s] open alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288, 293 (1984). The magistrate in the present case incorrectly concluded that the Supreme Court's decision in *Metromedia* controlled the outcome of this case. There, the plurality recognized that billboards are unique advertising devices that cannot easily be replaced by newspapers, television, or leaflets. Nevertheless, the San Diego ordinance in *Metromedia* imposed a city-wide ban on most signs. Indeed, the concurrence construed the ordinance as a total ban on billboard advertising. 453 U. S. at 525-26. Similarly, in *John Donnelly & Sons,* 639 F. 2d 6, the Maine statute prohibited all signs except those authorized in the statute.[16] Unlike the Maine statute and the San Diego ordinance, the Billboard Act and regulations leave open

[16]As discussed above, these exceptions included memorial and historical plaques, signs identifying bus stops, political campaign signs, and signs announcing auctions and fairs.

ample alternatives for communication of non-commercial and commercial messages. The prohibition against off-premises signs in the Billboard Act and regulations does not apply in areas zoned commercial or industrial prior to September 21, 1959. Signs unrelated to an on-premises activity are permitted in urban areas provided that the sign is located more than 660 feet from the interstate highway. Non-commercial and commercial messages are permitted anywhere provided that an activity relating to the message is conducted on the premies. Finally, the restrictions do not regulate the erection or maintenance of signs other than in areas near interstate or federal-aid primary highways. *See City of Renton,* 106 S. Ct. 925 (ordinance limiting adult theaters left reasonable alternative avenues of communication because ordinance left five percent of the city open for use as adult theaters); *State* v. *Lotze,* 92 Wash. 2d 52, 593 P. 2d 811 (1979) (statute prohibiting all signs within 660 feet of interstate, federal-aid primary, and scenic highways excepted from restriction signs in commercial or industrial areas and signs advertising sale or lease of property and activity on property on which they were located, and directional and official signs in view of scenic highways, left ample alternative channels of communication). Although the cost of erecting a sign may be greater in unprotected areas, the first amendment "requires only that [Kentucky] refrain from effectively denying [appellees] a reasonable opportunity to [erect a sign within Kentucky]." *City of Renton,* 106 S. Ct. at 932. The Billboard Act and regulations do not effectively deny appellees a reasonable opportunity to erect a sign with a religious or political message.

V.

Accordingly, the judgment of the District Court is REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-5423

JAMES E. WHEELER,
NORA L. WHEELER and
SHARON CARMICHAEL, - - - *Plaintiffs-Appellees,*

v.

COMMISSIONER OF HIGHWAYS, COMMONWEALTH
OF KENTUCKY, - - - *Defendant-Appellant.*

Before: KENNEDY, RYAN and NORRIS, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed.

IT IS FURTHER ORDERED that Defendant-Appellant recover from Plaintiffs-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk

Issued as Mandate: 8/13/87

A True Copy.

Attest:
(s) Michelle D. Man, Deputy Clerk

No. 86-5423

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. WHEELER, ET AL., - - *Plaintiffs-Appellees,*

v.

JOHN C. ROBERTS, ET AL., - *Defendant-Appellant,*

Before: KENNEDY, RYAN and NORRIS, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellee, the court concludes that the issues raised therein were fully considered upon the original oral arguments and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 74-29

JAMES E. WHEELER, Et Al., - - - - - *Plaintiffs,*

v.

JOHN C. ROBERTS, COMMISSIONER OF HIGHWAYS, - - - - - - - *Defendant.*

MEMORANDUM OPINION—Filed March 7, 1986

This action is brought pursuant to 42 U.S.C. § 1983. It presents the important question whether the Kentucky Billboard Act, KRS 177.830 - 177.890, and regulations promulgated thereunder, 603 KAR 3:010, which prohibit plaintiffs from posting a non-commercial message on a leased billboard near an interstate highway offend the Constitution. With the written consent of the parties, the matter has been referred to the undersigned for plenary consideration. 28 U.S.C. § 636(c)(1), (2).

Generally, the Kentucky statute and regulations prohibit billboards within 660 feet of an interstate highway with certain exceptions. Among such exceptions are billboards in areas zoned commercial or industrial prior to September 21, 1959, and billboards displaying certain categories of information pertaining to activities conducted at the site of the billboard ("on-site" billboards).

Plaintiffs have attempted to secure permission to erect signs in an area not zoned commercial or industrial prior to September 1959. Permission to erect these signs on

which plaintiffs desired to communicate their political, ideological or religious beliefs[1] have been denied because the billboard would not advertise an "on-premise" activity. (Tr. 18 and 167-168.)

"On-premise" advertising devices are those devices "that contain a message relating to an activity or the sale of a product on the property on which they are located." 603 KAR 3:010 §2(3). Such devices would include those signs advertising such diverse commercial endeavors as "Bob Evans Restaurants", "Earl F. Smith, D.D.S." and "Eddie Sutton's Wildcat Basketball Camp" would be permitted next to an interstate highway so long as there was a restaurant, dental office or basketball camp doing business "on-premises". However, if "Eddie Sutton's Wildcat Basketball Camp" was being conducted on the campus of the University of Kentucky rather than on the site adjacent to the interstate highway, the same sign would be prohibited.

Signs advertising activities not normally considered to be commercial, *viz.*, "Pollard Baptist Church", "Headquarters, American Red Cross of Kentucky" and "Bullitt County Public Library" would be allowed, if those activities were being conducted on property adjacent to the interstate. However, a sign of the same size, shape and color advertising a church, charitable organization or public service facility located on property not contiguous to the interstate could not be erected. 603 KAR 3:010 §2(2).

More importantly, signs containing ideological messages, *see John Donnelly & Sons* v. *Campbell,* 639 F. 2d 6,

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[1]For example, in one instance, James E. Wheeler wanted to erect a billboard promoting the candidacy of George Wallace for President. (Tr. 17-18.) At another time, Sharon Carmichael (now May) wanted to erect a billboard expressing her dissatisfaction with forced busing. (Tr. 166-167.)

9 n. 5 (1st Cir. 1980), *aff'd*, 453 U. S. 916 (1981), would manifestly be affected. Messages such as "Abortion is Murder", "Save the Whales", "No Nukes" and those attempted to be conveyed by the instant plaintiffs are prohibited under the law, even in areas where "on-premises" commercial or other activities can permissibly be advertised. As stated in the *Donnelly* decision, this would appear to be "a peculiar inversion of First Amendment values." 639 F. 2d at 16; *see also Metromedia, Inc.*, 453 U. S. at 512-157.

Defendant attempts to excuse the ban on the ground that there are alternative channels of communication available. However, as James E. Wheeler complained, those other forms of mass media are expensive for people of limited means. (Tr. 23-27). *See Metromedia, Inc.*, 453 U. S. at 516; *Donnelly*, 639 F. 2d at 16. Moreover, where, as here, the statute and regulations make distinctions based on the content of signs, the alternative channels argument has no applicability. *Metromedia, Inc.*, 453 U. S. at 515-157.

Accordingly, after trial, it is concluded that the Kentucky Billboard Act and regulations promulgated thereunder are unconstitutional on their face.

A judgment in conformity herewith shall this date be filed.

This the 7th day of March, 1986.

(s) Joseph M. Hood
Joseph M. Hood
United States Magistrate

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 74-29

JAMES E. WHEELER, Et Al., - - - - - *Plaintiffs,*

v.

JOHN C. ROBERTS, COMMISSIONER OF HIGHWAYS, - - - - - - - *Defendant.*

JUDGMENT—Filed March 7, 1986

In conformity with the Memorandum Opinion of even date,

IT IS ORDERED AND ADJUDGED that the Kentucky Billboard Act and regulations promulgated thereunder are unconstitutional on their face.

IT IS FURTHER ORDERED AND ADJUDGED that defendant and his successors be, and they hereby are, enjoined from further enforcing said act and regulations.

This the 7th day of March, 1986.

(s) Joseph M. Hood
Joseph M. Hood
United States Magistrate

UNITED STATES DISTRICT COURT

FRANKFORT
EASTERN DISTRICT OF KENTUCKY

Civil Action No. 74-29

JAMES E. WHEELER, Et Al., - - - - - *Plaintiffs,*

v.

JOHN C. ROBERTS, COMMISSIONER OF HIGHWAYS, - - - - - - - *Defendant.*

ORDER—Filed March 26, 1986

It appearing that on March 21, 1986 the State Defendant herein, by counsel, moved the court to amend and clarify the judgment previously entered herein, and being advised,

IT IS ORDERED that said motion to amend and clarify the judgment shall be, and the same hereby is DENIED.

This the 26th day of March, 1986.

(s) Joseph M. Hood
Joseph M. Hood
United States Magistrate

APPENDIX C

603 KAR 3:010. Advertising devices on interstates.

RELATES TO: KRS 177.830 to 177.890

PURSUANT TO: KRS 13.082, 174.050, 177.830 to 177.890

NECESSITY AND FUNCTION: KRS 177.830 to 177.890 authorizes the Bureau of Highways to establish regulations for the control of advertising devices on interstate highways.

Section 1. (1) Except as provided for in this regulation, no person shall erect or maintain any advertising device within any protected area if such device is legible or identifiable from the main traveled way of any interstate highway.

(2) The erection or maintenance of any advertising device located outside of "urban areas" and beyond 660 feet of the right of way which is legible and/or identifiable from the main traveled way of any interstate highway is prohibited with the exception of:

(a) Directional and official signs and notices;

(b) Signs advertising the sale or lease of property upon which they are located; or

(c) Signs advertising activities conducted on the property on which they are located.

Section 2. Definitions. The following terms when used in this regulation shall have the following meanings:

(1) "Advertising device" means any billboard, sign, notice, poster, display or other device intended to attract the attention of operators of motor vehicles on the highway, and shall include a structure erected or used in connection with the display of any such device and all lighting or other attachments used in connection therewith. However, it does not include directional or other official signs or signals erected by the state or other public agency having jurisdiction.

(2) "Billboard" advertising devices are those devices that contain a message relating to an activity or product that is foreign to the site on which the device and message is located or is an advertising device erected by a company or individual for the purpose of selling advertising messages for profit.

(3) "On-premise" advertising devices are those devices that contain a message relating to an activity or the sale of a product on the property on which they are located.

(4) "Center line of the highway" means a line equidistant from the edges of the median separating the main traveled ways of a divided highway, or the center line of the main traveled way of a non-divided highway.

(5) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw or in any way bring into being or establish.

(6) "Legible" means capable of being read without visual aid by a person of normal visual acuity, or capable of conveying an advertising message to a person of normal visual acuity.

(7) "Main traveled way" means the traveled way of a highway on which through traffic is carried. In the case of a divided highway, the traveled way of a separated roadway for traffic in opposite directions is a main traveled way. It does not include such facilities as frontage roads, turning roadways, or parking area.

(8) "Protected areas" means all areas within the boundaries of this Commonwealth which are adjacent to and within 660 feet of the edge of the right-of-way of all interstate highways within the Commonwealth. Where these highways terminate at a state boundary which is not perpendicular or normal to the center line of the highway, "protected areas" also means all areas inside the boundaries of the Commonwealth which are within 660 feet of

the edge of the right-of-way of an interstate highway in an adjoining state.

(9) "Identifiable" means capable of being related to a particular product, service, business or other activity even though there is no written message to aid in establishing such relationship.

(10) "Traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders.

(11) "Turning roadway" means a connecting roadway for traffic turning between two (2) intersection legs of an interchange.

(12) "Visible" means capable if being seen (whether or not legible) without visual aid by a person of normal visual acuity.

(13) "Permitted" as used in this regulation means to exist only by permit from the Department of Transportation Bureau of Highways.

(14) "Allowed" as used in this regulation means to exist without a permit from the Department of Transportation Bureau of Highways.

(15) "Commercial or industrial area" means:

(a) The land use for the area as of September 21, 1959, was clearly established by state law as industrial or commercial and is zoned commercial or industrial at the time of the application, or

(b) The land use for such area was within an incorporated municipality as such boundaries existed on September 21, 1959, and is zoned for commercial or industrial use.

(16) "Commercial or industrial activities" means those activities generally recognized as commercial or industrial by zoning authorities in this state, except that none of the

following activities shall be considered commercial or industrial:

(a) Outdoor advertising structures.

(b) Hospitals, nursing homes, cemeteries, funeral homes, etc. Professional office buildings and roadside markets not open over three (3) months a year.

(c) Agricultural, forestry, ranching, grazing, farming and related activities.

(d) Activities conducted in a building principally used as a residence.

(e) Railroad tracks and minor sidings.

(f) The sale or leasing of property.

(17) "Urban area" means an urbanized area or, in the case of an urbanized area encompassing more than one (1) state, that part of the urbanized areas in each such state or an urban place as designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the Secretary of the United States Department of Transportation. Such boundaries shall, as a minimum, encompass the entire urban place designed by the Bureau of the Census. Such urban areas shall be designated by official order of the Kentucky Secretary of Transportation.

(18) "Routine maintenance" means that maintenance is limited to replacement of nuts and bolts, nailing, riveting or welding, cleaning and painting, or manipulating to level or plumb the device but not to the extent of adding guys or struts for the stabilization of the sign or structure or substantially changing the sign. Replacement of new or additional panels or facing shall not constitute routine

maintenance. The routine changing of messages is considered to be routine maintenance. Routine maintenance includes laminating or preparing panels in a plant or factory for the changing of messages.

(19) "Activity boundary line" means regularly used buildings, parking lots, storage and process areas which are an integral part of and contiguous to the activity.

(20) "Abandoned or discontinued" means that for a period of one (1) year or more that the sign:

(a) Has not displayed any advertising matter; or

(b) Has displayed obsolete advertising matter; or

(c) Has needed substantial repairs.

(21) "Non-conforming sign" means a sign which was lawfully erected but does not comply with the provisions of state law or regulations passed at a later date or later fails to comply with state law or regulations due to changed conditions, such as but not limited to, zoning change, highway relocation or reclassification, size, spacing or distance restrictions. Performance of other than routine maintenance shall cause a non-conforming sign to lose its status and to become an illegal sign.

(22) "Destroyed" means that the sign has sustained damage by any means in excess of sixty (60) percent of the structure and facing or sixty (60) percent of the replacement value of such sign.

Section 3. General Provisions. (1) Erection or existence of the following advertising devices may not be permitted or allowed in protected areas:

(a) Advertising devices advertising an activity that is illegal under state or federal law.

(b) Obsolete advertising devices.

(c) Advertising devices that are not clean and in good repair.

(d) Advertising devices that are not securely affixed to a substantial structure.

(e) Advertising devices illuminated by other than white lights.

(f) Advertising devices which attempt or appear to attempt to direct the movement of traffic or which interfere with, imitate or resemble any official traffic sign, signal or device.

(g) Advertising devices which prevent the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic.

(h) Signs which contain, include, or are illuminated by any flashing, intermittent or moving lights, except those giving public service information of time, date, temperature or weather and limited to one (1) cycle of four (4) displays. They may contain no other message. The maximum time limit for the completion of the four display cycle shall be five (5) seconds. Signs which have a continuous revolving or running message shall be limited to the same restrictions as to message content, limited to one (1) cycle and limited to a maximum of five (5) seconds for the completion of the one (1) cycle.

(i) Advertising devices which use lighting in any way unless it is so effectively shielded as to prevent beams or rays of light from being directed at any portion of the main traveled way of a highway or unless it is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.

(j) Advertising devices which move or have any animated or moving parts.

(k) Advertising devices erected or maintained upon trees or painted or drawn upon rocks or other natural features.

(l) Advertising devices exceeding 1,250 square feet in area, including border and trim, but excluding supports.

(m) Advertising devices closer than fifty (50) feet to the edge of the main traveled way of any interstate highway.

(2) An advertising device which is not visible from the main traveled way of the highway may be allowed in protected areas.

(3) Any advertising device which is legible from the main traveled way of any interstate highway must have an approved permit from the Department of Transportation Bureau of Highways, to be a legal advertising device.

(4) If the advertising device is legible from more than one (1) highway on which control is exercised, the appropriate criteria applies to all of these highways. (See also: 603 KAR 3:020.)

(5) A non-conforming sign may continue to exist until just compensation has been paid to the owner, only so long as it is:

(a) Not destroyed, abandoned or discontinued; and

(b) Subjected to only routine maintenance; and

(c) A sign conforming to local zoning or sign or building restrictions.

Section 4. Measurements of Distance. (1) In determining protected areas, distances from the edge of a right-of-way shall be measured horizontally along a line at the same elevation and at a right angle to the center line of a highway for a distance of 660 feet.

(2) In measuring distances for determination of spacing for advertising devices, two (2) lines shall be drawn perpendicular to the center line of the main traveled way, so as to cause the two (2) lines to embrace the greatest longitude along the center line of said highway.

(3) V-shaped or back-to-back type billboard advertising devices shall have no greater distance than fifteen (15) feet apart at the nearest point and must be connected by bracing or maintenance walkway.

(4) The spacing for billboard advertising device structures as described in Section 5(4) of this regulation, shall be measured from the nearest point of each structure to the other.

Section 5. "Billboard" Advertising Device Provisions. (1) "Billboard" advertising devices may be constructed and maintained in protected areas which are zoned commercial or industrial as defined in Section 2(15) of this regulation, and comply with the provisions of this regulation for this type advertising device and other applicable state, county or city zoning ordinances or regulations. Limited to a maximum of 1,250 square feet subject to other provisions of this regulation.

(2) V-shaped or back-to-back "billboard" advertising devices will be considered as one (1) advertising device structure and must meet specifications as described in Section 4(3) of this regulation.

(3) "Billboard" advertising devices may contain two (2) messages per facing not to exceed the maximum sized area as set forth in Section 3(1) of this regulation.

(4) No "billboard" advertising device structure shall be erected within 500 feet of any other such advertising device structure on the same side of the highway, unless separated by a building, natural obstruction or roadway in such manner that only one (1) sign located within the required spacing distance is visible from the highway at any one time. (See Measurement of spacing, Section 4(4) of this regulation). This spacing shall not apply to on-premise advertising devices nor will on-premise advertising devices affect the spacing of other advertising structures. Billboard

structures in legal existence on the effective date of this amendment which are less than 500 feet from any other such advertising device structure on the same side of the highway, may continue to remain in place until they are destroyed, abandoned or discontinued as defined in this regulation, as long as only routine maintenance as described in Section 2(18) of this regulation is performed on them.

(5) "Billboard" advertising devices that were legally erected may remain in place if they meet all criteria except spacing. Only routine maintenance may be performed on the sign and its structure until such time as proper spacing as described in this regulation is attained.

(6) Spacing rights will be issued on a "first come, first served" basis. Proof of lease of a site must accompany the application. Updating of proof of lease and application will be required annually until a sign has been erected.

Section 6. "On-premise" Advertising Devices. (1) "On-premise" advertising devices may have a maximum of 1,250 square feet in area if they qualify as commercial or industrial activities as set forth in Section 2(16) of this regulation, and are on or within fifty (50) feet of the advertised activity and are within the property boundary lines of such activity.

(2) To qualify as an "on-premise" advertising device, the device must be within the property boundary lines of the advertised activity.

(3) No "on-premise" advertising device may exceed twenty (20) feet in length, width or height or 150 square feet in area including border and trim but exceeding supports, if it is farther than fifty (50) feet from the activity boundary lines (not the property boundary lines).

(4) No "on-premise" advertising device advertising a commercial or industrial activity as set forth in Section

2(16) of this regulation, shall be located more than 400 feet, measured within the property boundary, from the advertised activity. In using a corridor to reach the location of the device, the corridor must be no less than 100 feet in width and must be an integral part of the property on which the advertised activity is located. No other activity which is in any manner foreign to the advertised activity may be located on or have use of said corridor between the advertised activity and the location of the device. No activity incidental to the primary activity advertised will be considered in taking measurements.

(5) Only one (1) "on-premise" advertising device which is listed as an exception in Section 2(16) of this regulation, may be located in such a manner that it is legible from the main traveled way.

(6) Only one (1) of the following "on-premise" advertising devices may be located in such a manner that it is legible from the main traveled way.

(a) The setting forth or indicating the name and address of the owner, lessee or occupant of the property on which the advertising device is located; or

(b) The name or type of business or profession conducted on the property on which the advertising device is located; or

(c) Information required or authorized by law to be posted or displayed on such property; or

(d) The sale or leasing of the property upon which the advertising device is located.

1. Advertising devices which are for the purpose of sale or leasing of property by a real estate company or individual will be limited to a six (6) month permit. After the six (6) months, the real estate name must be removed and the message advertising the sale or lease of the property along with the telephone number of the real estate

company is all that may remain. This will be a condition of the permit.

2. If the property is for sale by the owner and the owner is other than a real estate company, the message stating the leasing or sale of the property may list the name of the owner (letters of owners' name may be no larger than one-half (1/2) the size of the letters in the basic message), and the telephone number and will not be restricted to the six (6) month permit.

(c) Advertising customarily used at similar places of business that are not legible from the main traveled way of the highway; or

(f) The advertisment or control of an activity or sale of products on the property where the advertising device is located.

(7) No advertising device referred to in subsections (5) and (6) of this section may exceed twenty (20) feet in length, width or height or 150 square feet in area including border and trim but excluding supports. Nor will these advertising devices be subject to restrictions as set forth in subsection (4) of this section.

(8) Brand name, "on-premise" advertising devices may advertise only the activities conducted upon the property on which they are located with exceptions as to type as follows:

(a) "Ford," "Chevrolet," "Pontiac," etc.

(b) "A&P," "Kroger," etc.

(c) "Kentucky Fried Chicken," "Bob Evans Restaurants,," "Stuckeys," etc.

(9) Brand names such as the following may not be advertised because they are incidental to the primary activity:

(a) "Auto Light," "Delco," etc.

(b) "8 O'Clock Coffee," "Armour Meats," "Clabber Girl Baking Powder," etc.

(c) "Coca-Cola," "Pepsi," "Winstons," etc.

(10) Application for advertising device permits for on-premise signs must give a detailed description of the exact wording of the message to be conveyed on the advertising device. The information may be furnished by either a photograph or a drawing, and may be changed only upon the approval of the Bureau of Highways or a new application submitted by the permit holder which shows the proposed change in the message.

(11) An exception to subsection (10) of this section is that a marquee type on-premise advertising device, such as a typical theatre or cinema advertising device, may change messages without a new application. This message change may be from one (1) legitimate on-premise activity to another. (HIWA-AD-3; 1 Ky. R. 810; eff. 5-14-75; Am. 3 Ky. R. 390; 585; eff. 2-2-77; 4 Ky. 439; eff. 7-5-78; 5 Ky. R. 248; eff. 11-1-78.)

603 KAR 3:020. Advertising devices on federal aid primary system.

RELATES TO: KRS 177.830 to 177.890

PURSUANT TO: KRS 13.082, 174.050, 177.830 to 177.890

NECESSITY AND FUNCTION: KRS 177.830 to 177.890 authorizes the Bureau of Highways to establish regulations for the control of advertising devices on Federal Aid Primary System.

Section 1. (1) Except as provided in this regulation, no person shall erect or maintain any advertising device within any protected area if such device is legible or identifiable from the main traveled way of any federal aid primary highway.

(2) The erection or maintenance of any advertising device located outside of urban areas and beyond 660 feet of the right of way which is legible and/or identifiable from the main traveled way of any federal aid primary highway is prohibited with the exception of:

(a) Directional and official signs and notices;

(b) Signs advertising the sale or lease of property upon which they are located; or

(c) Signs advertising activities conducted on the property on which they are located.

Section 2. Definitions. (1) "Advertising device" means any billboard, sign, notice, poster, display, or other device intended to attract the attention of operators of motor vehicles on the highway, and shall include a structure erected or used in connection with the display of any such device and all lighting or other attachments used in connection therewith. However, it does not include directional or other official signs or signals erected by the state or other public agency having jurisdiction.

(2) "Billboard" advertising devices are those devices that contain a message relating to an activity or product that is foreign to the site on which the device and message is located or is an advertising device erected by a company or individual for the purpose of selling advertising messages for profit.

(3) "On-premise" advertising devices are those devices that contain a mesage relating to an activity or the sale of a product on the property on which they are located.

(4) "Center line of the highway" means a line equidistant from the edges of the median separating the main traveled ways of a divided highway, or the center line of the main traveled way of a non-divided highway.

(5) "Erect" means to construct, build, raise, assemble, place, affix, create, paint, draw or in any way bring into being or establish.

(6) "Legible" means capable of being read without visual aid by a person of normal visual acuity, or capable of conveying an advertising message to a person of normal visual acuity.

(7) "Main traveled way" means the traveled way of a highway on which through traffic is carried. In the case of a divided highway, the traveled way of a separated roadway for traffic in opposite directions is a main traveled way. It does not include such facilities as frontage roads, turning roadways, or parking area.

(8) "Traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders.

(9) "Protected areas" means all areas within the boundaries of the Commonwealth which are adjacent to and within 660 feet of the edge of the right-of-way of all federal and primary highways within the Commonwealth. Where these highways terminate at a state boundary which is not perpendicular or normal to the center line of the highway, "protected areas" means all areas inside the boundaries of the Commonwealth which are within 660 feet of the edge of the right-of-way of a federal aid primary highway in an adjoining state.

(10) "Federal aid primary highway" means any highway, road, street, appurtenant facility, bridge or overpass including a turnpike or limited access highway which is designated a portion of federal aid primary highway system as may be established by law or as may be so designated by the Bureau of Highways and the United States Department of Transportation.

(11) "Identifiable" means capable of being related to a particular product, service, business or other activity

even though there is no written message to aid in establishing such relationship.

(12) "Turning roadway" means a connecting roadway for traffic turning between two (2) intersecting legs of an interchange.

(13) "Visible" means capable of being seen (whether or not legible) without visual aid by a person of normal visual acuity.

(14) "Permitted" as used in this regulation means to exist only by permit from the Department of Transportation, Bureau of Highways.

(15) "Allowed" as used in this regulation means to exist withou a permit from the Department of Transportation, Bureau of Highways.

(16) "Commercial or industrial zone" means an area zoned for business, commerce or trade pursuant to state or local law, regulation or ordinance. To be zoned commercial or industrial, the entire city or county must be "comprehensively" zoned.

(17) "Comprehensively zoned" means that each parcel of land under the jurisdiction of the zoning authority has been placed in some zoning classification.

(18) "Unzoned commercial or industrial area" means an area which is not zoned by state or local law, regulation or ordinance and on which a commercial or industrial activity is located, together with an area extending along the highway for a distance of 700 feet on each side of the road. Each side of the highway where a commercial or industrial activity is located will be considered separately in applying this definition. All measurements shall be from outer edges of the regularly used building, parking lots, storage or process areas of the activities and not, from the property boundary lines.

(19) "Commercial or industrial activities" means those activities generally recognized as commercial or industrial by zoning authorities in this state, except that none of the following activities shall be considered commercial or industrial:

(a) Outdoor advertising structures.

(b) Hospitals, nursing homes, cemeteries, funeral homes, etc; professional office buildings; and roadside markets not open over three (3) months a year.

(c) Agricultural, forestry, ranching, grazing, farming, and related activities, including but not limited to, wayside fresh produce stands.

(d) Activities normally or regularly in operation less than three (3) months of the year.

(e) Transient or temporary activities.

(f) Activities not visible from the main traveled way.

(g) Activities more than 300 feet from the nearest edge of the right-of-way.

(h) Activities conducted in a building principally used as a residence.

(i) Railroad tracks and minor sidings.

(j) The sale or leasing of property.

(20) "Urban area" means an urbanized area or, in the case of an urbanized area encompassing more than one (1) state, that part of the urbanized areas in each such state or an urban place as designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible state and local officials in cooperation with each other, subject to approval by the secretary of the United States Department of Transportation. Such boundaries shall, as a minimum, encompass the entire urban

place designated by the Bureau of the Census. Such urban areas shall be designated by official order of the Kentucky Secretary of Transportation.

(21) "Routine maintenance" means that maintenance is limited to replacement of nuts and bolts, nailing, riveting or welding, cleaning and painting, or manipulating to level or plumb the device but not to the extent of adding guys or struts for the stabilization of the sign or structure or substantially changing the sign. Replacement of new or additional panels or facing shall not constitute routine maintenance. The routine changing of messages is considered to be routine maintenance. Routine maintenance includes laminating or preparing panels in a plant or factory for the changing of message.

(22) "Activity boundary line" means regularly used buildings, parking lots, storage and process areas which are an integral part of and contiguous to the activity.

(23) "Abandoned or discontinued" means that for a period of one (1) year or more that the sign:

(a) Has not displayed any advertising matter; or

(b) Has displayed obsolete advertising matter; or

(c) Has needed substantial repairs.

(24) "Non-conforming Sign" means a sign which was lawfully erected but does not comply with the provisions of state law or regulations passed at a later date or later fails to comply with state law or regulations due to changed conditions, such as but not limited to, zoning change, highway relocation or reclassification, size, spacing or distance restrictions. Performance of other than routine maintenance shall cause a non-conforming sign to lose its status and to become an illegal sign.

(25) "Destroyed" means that the sign has sustained damage by any means in excess of sixty (60) percent of

the structure and facing or sixty (60) percent of the replacement value of such sign.

(26) "Church and civic club off premise sign" means any nationally, regionally or locally known religious, or non-profit organization advertising device.

(27) "Public service sign" means a sign erected or located on a school bus shelter.

(28) "Public service message" means a message pertaining to an activity or service which is performed for the benefit of the public and not for profit or gain of a particular person, firm or corporation. This definition applies to signs on school bus shelters only.

Section 3. General Provisions. (1) Erection or existence of the following advertising devices may not be permitted or allowed in protected areas:

(a) Advertising devices advertising an activity that is illegal under state or federal law.

(b) Obsolete advertising devices.

(c) Advertising devices that are not clean and in good repair.

(d) Advertising devices that are not securely affixed to a substantial structure.

(e) Advertising devices which attempt or appear to attempt to direct the movement of traffic or which interfere with, imitate or resemble any official traffic sign, signal or device.

(f) Advertising devices which prevent the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic.

(g) Signs which contain, include, or are illuminated by any flashing, intermittent or moving lights, except those giving public service information of time, date, temperature or weather and limited one (1) cycle of four (4) displays.

They may contain no other message. The maximum time limit for the completion of the four (4) display cycle shall be five (5) seconds.

(h) Advertising devices which use lighting in any way unless it is so effectively shielded as to prevent beams or rays of light from being directed at any portion of the main traveled way of a highway, or unless it is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.

(i) Advertising devices which move or have any animated or moving parts, unless they are "on-premise" advertising devices and are located in commercially or industrially zoned areas.

(j) Advertising devices erected or maintained upon trees or painted or drawn upon rocks or other natural features.

(k) Advertising devices erected upon or overhanging the right-of-way.

(2) An advertising device which is not visible from the main traveled way of the highway may be allowed in protected areas.

(3) If the advertising device is legible from more than one (1) highway on which control is exercised, the appropriate criteria applies to all of these highways. (See also: 603 KAR 3:010.)

(4) No advertising device may be erected or maintained within the state right-of-way except directional or other official signs or signals erected by the state or other public agency having jurisdiction.

(5) Directional and other official signs, including signs placed by the bureau, signs denoting the location of underground utilities (limited to two (2) square feet), signs erected by federal, state and local governments to delineate

boundaries of reservations, parks or districts (limited to 150 square feet), and signs such as "posted," "no fishing," "no hunting," etc. placed by property owners to discourage trespassing (limited to two (2) square feet) may be permitted or allowed subject to other provisions in these regulations.

(6) No on-premise advertising device, in zoned or unzoned commercial or industrial areas, will affect spacing for billboard advertising.

(7) A permit will be required from the Department of Transportation, Bureau of Highways for any billboard advertising device. On-premise advertising devices will be allowed and controlled by surveillance.

(8) A non-conforming sign may continue to exist until just compensation has been paid to the owner, only so long as it is:

(a) Not destroyed, abandoned or discontinued; and

(b) Subjected to only routine maintenance; and

(c) A sign conforming to local zoning or sign or building restrictions.

Section 4. Measurements of Distance. (1) In determining protected areas, distances from the edge of a right-of-way shall be measured horizontally along a line at the same elevation and at a right angle to the center line of a highway for a distance of 660 feet.

(2) In measuring distances for determination of spacing for billboard advertising devices, two (2) lines shall be drawn perpendicular to the center line of the main traveled way, so as to cause the two (2) lines to embrace the greatest longitude along the center line of said highway.

(3) V-shaped or back to back type billboard advertising devices shall have no greater distance than fifteen (15) feet

apart at the nearest point and must be connected by bracing or maintenance walkway.

(4) The spacing for billboard advertising devices as described in Section 5, subsections (12) and (13) shall be measured from the nearest point between each device.

(5) In measuring distances for the determination of an unzoned commercial or industrial area, two (2) lines shall be drawn perpendicular to the center line of the main traveled way to encompass the greatest longitudinal distance along the center line of the highway. All areas within the confines of these lines shall be considered a part of the unzoned commercial or industrial area. Measurements for these areas shall begin at the outside edge of the activity boundary lines and shall be measured 700 feet in each direction.

Section 5. "Billboard" advertising device provisions (1) "Billboard" advertising devices may be constructed and maintained in protected areas which are zoned or unzoned commercial or industrial as defined in Section 2, subsections (16) and (18) of this regulation and comply with the provisions of this regulation for this type advertising device and other applicable state, county or city zoning ordinances or regulations and shall be limited to a maximum of 1,250 square feet subject to other provisions of this regulation.

(2) V-shaped or back to back "billboard" advertising devices will be considered as one (1) advertising device structure and must meet specifications as described in Section 4, subsection (3).

(3) "Billboard" advertising devices may contain two (2) messages per facing not to exceed the maximum sized area as set forth in Section 5, subsection (1)(1).

(4) V-shaped or back to back structures will be allowed the maximum 1,250 square feet per facing.

(5) "Billboard" advertising devices that were legally erected may remain in place if they meet all criteria except spacing. Only routine maintenance may be performed on the sign and its structure until such time as proper spacing as described in this regulation is attained.

(6) Spacing rights will be issued on a "first come, first served" basis. Proof of lease of a site must accompany the application. Updating of proof of lease and application will be required annually until a sign has been erected.

(7) Billboard advertising devices may be permitted in zoned or unzoned commercial or industrial areas subject to other provisions of this regulation.

(8) Billboard advertising devices constructed in unzoned commercial and industrial areas will be permitted to exist as long as there is a commercial or industrial operated business. Upon the termination or abandonment of a business or industry for which the unzoned commercial or industrial area was created, the billboard advertising devices may remain in existence for one (1) year.

(9) No billboard advertising device may be illuminated by other than white lights.

(10) Any billboard advertising device which is legible or identifiable from the main traveled way must have an approved permit from the Department of Transportation, Bureau of Highways.

(11) No unzoned commercial or industrial area may be created when a commercial or industrial activity is more than 300 feet from the right-of-way.

(12) Spacing for billboard advertising, device structures in unzoned commercial or industrial areas as described in Section 4, subsections (4) and (5) will be 300 feet measured from the nearest point between each advertising device, unless separated by a building, roadway, or natural obstruction, in such a manner that only one (1) sign located

within the required spacing is visible from the highway at any time. This spacing will be reduced to 100 feet within incorporated municipalities which do not have comprehensive zoning.

(13) Spacing for billboard advertising device structures in any comprehensively zoned commercial or industrial area will be 100 feet, unless separated by a building, roadway, or natural obstruction, in such a manner that only one (1) sign located within the required spacing is visible from the highway at any time.

Section 6. "On-premise" advertising devices. (1) "On-premise" advertising devices may have a maximum of 1,250 square feet in area if they qualify as commercial or industrial activities as set forth in Section 2, subsection (19) of this regulation, and are on or within fifty (50) feet of the advertised activity and are within the property boundary lines of such activity.

(2) Only one (1) "on-premise" advertising device advertising a commercial or industrial activity as described in Section 2, subsection (19), may be located at a distance greater than fifty (50) feet from the activity boundary line. This advertising device will be limited in size as set forth in subsection (4) of this section. All other advertising devices must be within fifty (50) feet of the advertised activity.

(3) To qualify as an "on-premise" advertising device, the device must be within the property boundary lines of the advertised activity.

(4) No "on-premise" advertising device may exceed twenty (20) feet in length, width or height or 150 square feet in area including border and trim, but excluding supports, if it is farther than fifty (50) feet from the activity boundary lines (not the property boundary lines).

(5) Only one (1) "on-premise" advertising device which is listed as an exception in Section 2, subsection (19) may be located in such a manner that it is legible or identifiable from the main traveled way.

(6) Only one (1) of the following "on-premise" advertising devices may be located in such a manner that it is legible or identifiable from the main traveled way.

(a) The setting forth or indicating the name and address of the owner, lessee or occupant of the property on which the advertising device is located; or

(b) The name or type of business or profession conducted on the property on which the advertising device is located; or

(c) Information required or authorized by law to be posted or displayed on such property; or

(d) The sale or leasing of the property upon which the advertising device is located.

1. Advertising devices which are for the purpose of sale or leasing of property by a real estate company or agency will be limited to a six (6) month permit. After the six (6) months, the real estate company or agency name must be removed and the mesage advertising the sale or lease of the property along with the telephone number of the real estate company or agency is all that may remain. This will be a condition of the permit.

2. If the property is for sale by the owner and the owner is other than a real estate company or agency, the message stating the leasing or sale of the property may list the name of the owner (letters of owners name may be no larger than one-half (1/2) the size of the letters in the basic message), and the telephone number and will not be restricted to the six (6) month permit.

(e) Advertising customarily used at similar places of business that are not legible or identifiable from the main traveled way of the highway; or

(f) The advertisement or control of an activity or sale of products on the property where the advertising device is located.

(7) No advertising device referred to in subsections (5) and (6) of this section may exceed twenty (20) feet in length, width or height or 150 square feet in area including border and trim but excluding supports.

(8) Each business is permitted as many signs, stating only the name of the business, as they desire. In the absence of such signs, the owner may have one (1) sign giving the name of the business and a particular brand name product. The sign may not contain more than two thirds (2/3) of the size for the brand name.

(9) The fact that a particular product is sold at a business will not be construed to mean that this is an activity.

(10) Brand name. "On-premise" advertising devices may advertise only the activities conducted upon the property on which they are located with exceptions as to type as follows:

(a) "Ford," "Chevrolet," "Pontiac," etc.

(b) "A&P," "Kroger," etc.

(c) "Kentucky Fried Chicken," "Bob Evans Restaurants," "Stuckeys," etc.

(d) Signs noting credit card acceptance or trading stamps may be allowed subject to a maximum size of eight (8) square feet.

(11) Brand names such as the following may not be advertised because they are incidental to the primary activity:

(a) "Autolite," "Delco," etc.

(b) "8 O'Clock coffee," "Armour meats," "Clabber Girl Baking Powder," etc.

(c) "Coca-Cola," "Pepsi," "Winstons," etc.

Section 7. "Grandfather Restrictions;" on-premise advertising devices in incorporated municipalities and urban areas. Grandfather restrictions as described in this section shall apply to the following advertising devices only:

(1) Only one (1) "on-premise" advertising device will be "permitted" to overhang the state right-of-way, advertising any one (1) business. This refers to only those advertising devices in existence at the time of the adoption of this regulation and where there is not space off the right-of-way to accommodate an advertising device.

(2) Any new building or structure which comes into being after the adoption of this regulation, which abuts or is upon the state right-of-way, in which a business or activity is to be located, and such business or activity requires an advertising device, such new device must meet the conditions set forth in subsection (4)(a) of this section in addition to other provisions of this section and other sections of this regulation.

(3) Only "routine maintenance" as described in this regulation will be "permitted" on any "on-premise" advertising device under grandfather restrictions in this section.

(4) Any time an existing "permitted' advertising device is replaced it must comply with the following criteria:

(a) No advertising device or portion of an advertising device may be erected that extends more than two (2) feet beyond the face of the building, if the building is abutting or within the state right-of-way. This condition does not apply to advertising devices when the building or structure has a setback of more than two (2) feet from the state

right-of-way. Any building with a setback from the right-of-way must reduce the overhang of the advertising device by the number of inches of the setback. No advertising device may be erected which has a base or any part of a base on the state right-of-way.

(5) Any advertising device with a base or any portion of a base which is located on the state right-of-way must be relocated off the right-of-way where there is sufficient space. If space is not available to relocate the existing advertising device off the right-of-way, relocation of the device must comply with restrictions as contained in subsection (4) of this section.

(a) Where there is space off the right-of-way to relocate an existing advertising device, the owner shall be notified and be allowed a reasonable amount of time to accomplish the relocation.

(b) in no instance shall the time allowed to relocate an advertising device, whose base is on the state right-of-way exceed a five (5) year period. No permit shall be issued for this type advertising device.

(6) Any "on-premise" advertising device "permitted" under grandfather restrictions, or any new advertising device, which is "permitted" to be erected under the provisions of subsection (4) of this section, must have an approved permit from the Department of Transportation, Bureau of Highways, to be a legal advertising device.

(7) No advertising device will be "permitted" under this section which interferes with any official sign, signal, or device.

(8) Any advertising device "permitted" under this section must meet the requirements for an "on-premise" advertising device as set forth in this regulation.

Section 8. "Church and civic club off-premise signs" provisions:

(1) Signs which qualify as "church and civic club signs" as described in Section 2, subsection (26) and which do not exceed the maximum size of eight (8) square feet including border and trim but excluding supports and which have spacing of 100 feet from any other church or civic club advertising device structure, which measurement is described in Section 4, subsections (2) and (5) shall be permitted.

(2) Only one (1) structure shall be permitted at any one (1) location.

(3) "Church and civic club signs" may contain the following message only:

(a) Name and address;

(b) Location and time of meetings, and a directional arrow;

(c) Special events such as vacation bible school, revival, etc., may be permitted. These temporary messages shall be in lieu of the original or a part of the original message and shall not exceed the maximum of eight (8) square feet.

(4) In the event two (2) organizations desire to erect one (1) structure for their signs, a "Welcome to (City or County)," may be placed at the top of the structure. No slogan, flamboyant design or special message shall be permitted in the "Welcome to" part of the sign.

(5) Maximum size for sign structures as described in subsection (4) of this section will be twenty (20) square feet, including border and trim excluding supports.

(6) Only one (1) advertising device structure which advertises a particular church or civic club, may be erected facing any one (1) direction in advance of the advertised activity on any one (1) road.

(7) No advertising device structure described in this section shall be permitted on the state rights-of-way.

(8) Church and civic club sign structures will not affect spacing for "Billboard" advertising structures.

(9) Church and civic sign structures must have a permit from the Department of Transportation, Bureau of Highways, to be a legal advertising device.

Sectoin 9. "Public Service Signs." "Public service signs" may be "permitted" if they conform to the following provisions:

(1) "Public service signs" may be permitted on school bus shelters only.

(2) Maximum size for a "public service sign" shall be thirty-two (32) square feet including border and trim.

(3) Must contain a public service message which occupies not less than fifty (50) percent of the area of the sign.

(4) May identify the donor, sponsor or contributor of the shelter.

(5) Contains no other message.

(6) Has obtained an encroachment permit from the Bureau of Highways prior to the existence of the sign if it is to be located on the state right-of-way.

(7) Has been authorized or approved in writing by the city or county having jurisdiction if it is to be located off the state right-of-way.

(8) Does not create a sight distance or saftey hazard.

(9) Only one (1) sign on each shelter shall face in any one (1) direction. (HIWA-AD-FAP-1; 1 Ky. R. 812; eff. 5-14-75; Am. 3 Ky. R. 393, 588; eff. 2-2-77; 4 Ky. R. 127; eff. 11-2-77; 4 Ky. R. 442; eff. 7-5-78.)

603 KAR 3:030. Primary road system classifications.

RELATES TO: KRS 177.020

PURSUANT TO: KRS 13.082, 174.050

NECESSITY AND FUNCTION: KRS 177.020 authorizes the Bureau of Highways to establish, construct, reconstruct

and maintain public roads as a part of the State Primary Road System as defined by KRS 177.020(1). This regulation is adopted to establish and classify the State Primary Road System.

Section 1. As authorized by KRS 177.020 the following classification of roads is established as the State Primary Road System:

(1) Classified system:

(a) Interstate highways:

(b) Parkways (toll roads);

(c) State primary;

(d) State secondary; and

(e) Rural secondary;

(2) Unclassified system.

Section 2. All roads or city streets or segments thereof adopted as part of the state primary road system and all eliminations of such roads or city streets from said system shall be indicated by an official order which shall, upon being signed by the Secretary of Transportation, or his designated representative, be kept on file in the Department of Transportation, Bureau of Highways, Frankfort, Kentucky 40601. (HIWA-SPRS; 1 Ky. R. 814; eff. 5-14-75.)

* * * * * * *

EXCERPTS FROM KENTUCKY REVISED STATUTES

BILLBOARD ADVERTISING

177.830 Definitions for KRS 177.830 to 177.890

As used in KRS 177.830 to 177.890, unless the context requires otherwise:

(1) "Limited-access highway" means a road or highway or bridge constructed pursuant to the provisions of KRS 177.220 through 177.310;

(2) "Interstate highway" means any highway, road, street, access facility, bridge or overpass which is designated as a portion of the national system of interstate and defense highways as may be established by law, or as may be so designated by the department of transportation in the joint construction of the system by the department of transportation and the United States department of transportation, bureau of public roads;

(3) "Federal-aid primary highway" means any highway, road, street, appurtenant facility, bridge or overpass which is designated as a portion of the federal-aid primary highway system as may be established by law or as may be so designated by the department of transportation and the United States department of transportation;

(4) "Turnpike" means any road or highway or appurtenant facility constructed pursuant to the provisions of KRS 177.390 through 177.570, or pursuant to the provisions of any other definition of "turnpike" in the Kentucky Revised Statutes, or any other highway, road, parkway, bridge or street upon which a toll or fee is charged for the use of motor vehicular traffic;

(5) "Advertising device" means any billboard, sign, notice, poster, display or other device intended to attract the attention of operators of motor vehicles on the high-

ways, and shall include a structure erected or used in connection with the display of any device and all lighting or other attachments used in connection therewith. However, it does not include directional or other official signs or signals erected by the state or other public agency having jurisdiction;

(6) "Highway or highways" as used in KRS 177.830 to 177.890 means limited access highway, interstate highway, federal-aid primary highway, or turnpike as defined in KRS 177.830 to 177.890;

(7) "Commercial or industrial zone" adjacent to a federal-aid primary highway means an area zoned to permit business, commerce or trade pursuant to lawful ordinance or regulation;

(8) "Unzoned commercial or industrial area" adjacent to a federal-aid primary highway means an area which is not zoned by state or local law, regulation or ordinance and on which either a commercial or industrial activity is conducted or a permanent structure therefor is located together with the area extending along the highway for such distances as may be determined by regulation promulgated by the secretary of transportation. Each side of the highway will be considered separately in applying this definition—all measurements shall be from the outer edges of the regularly used buildings, parking lots, storage or processing areas of the activities, not from the property lines of the activities, and shall be along or parallel the edge of the pavement of the highway;

(9) "Commercial or industrial activities" for purposes of unzoned industrial and commercial areas means those activities generally recognized as commercial or industrial by zoning authorities in this state, except that none of the following activities shall be considered commercial or industrial:

(a) Outdoor advertising structures;

(b) Agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, wayside fresh produce stands;

(c) Activities normally or regularly in operation less than three (3) months of the year;

(d) Transient or temporary activities;

(e) Activities not visible from the main traveled way;

(f) Activities more than 300 feet from the nearest edge of the right of way;

(g) Activities conducted in a building principally used as a residence;

(h) Railroad tracks and minor sidings.

(10) "Urban areas" means those areas which the secretary of transportation, in the exercise of his sound discretion and upon consideration being given to the population within boundaries of an area and to the traveling public determines by official order to be urban; provided, however, that any such determination or designation of the secretary shall not, in any way, be at variance with the federal law or regulation thereunder or jeopardize the allotment or qualification for federal-aid funds of the Commonwealth of Kentucky.

HISTORY: 1976 H 321, § 2, eff. 3-29-76

1968 S 367, § 1; 1966 c 76, § 1; 1960 c 175, § 1

Cross References

Regulation of advertising by billboards and signboards. 3 Am Jur 2d, Advertising § 14

National standards for regulation by states of outdoor advertising signs, displays and devices adjacent to the national system of interstate and defense highways, Code of Federal Regulations, Title 23, § 750.101 et seq.

CONSTITUTIONALITY:

377 SW(2d) 881 (1964), Moore v. Ward. KRS 177.830 to 177.990 (1960), the "Billboard Act," is constitutional.

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411 SW(2d) 39 (1967), Lunsford v. Ward. Designation of highway as a "limited access" highway by official order gives state authority to prohibit billboard advertising within 660 feet of right of way.

388 SW(2d) 358 (1964), Dept. of Highways v. Vandertoll. Condemnation where entire tract was taken for highway, roadside park, rest area and pedestrian crossing, in absence of showing of fraud by condemnee, or bad faith or abuse of discretion, trial court was in error in determining that necessity for taking entire acreage did not exist.

177.840 Repealed

HISTORY: 1976 H 321, § 5, eff. 3-29-76

1966 c 76, § 2; 1960 c 175, § 2

177.841 Billboard advertising prohibited; exceptions

(1) Except as otherwise provided in KRS 177.830 to 177.890, the erection or maintenance of any advertising device upon or within 660 feet of the right of way of any interstate highway or federal-aid primary highway is prohibited.

(2) The erection or maintenance of any advertising device located outside of an urban area and beyond 660 feet of the right of way which is legible and /or identifiable from the main traveled way of any interstate highway or federal-aid primary highway is prohibited with the exception of:

(a) Directional and official signs and notices;

(b) Signs advertising the sale or lease of property upon which they are located; or

(c) Signs advertising activities conducted on the property on which they are located.

HISTORY: 1976 H 321, § 3, eff. 3-29-76

Penalty, 177.990(2)

177.850 Purpose of KRS 177.830 to 177.890

The general purposes of KRS 177.830 to 177.890 and its specific objectives and standards are:

(1) To provide for maximum visibility along interstate highways, limited-access highways, federal-aid primary highways, turnpikes, and connecting roads or highways;

(2) To prevent unreasonable distraction of operators of motor vehicles;

(3) To prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations;

(4) To preserve and enhance the natural scenic beauty or the aesthetic features of the aforementioned interstate highways, limited-access highways, federal-aid primary highways, turnpikes, and adjacent areas;

(5) To promote maximum safety, comfort and well-being of the users of said highways.

HISTORY: 1966 c 76, § 3, eff. 6-16-66

1960 c 175, § 3

Cross References

Billboards and other outdoor advertising signs as civil nuisance. 38 ALR 3d 647

177.860 Standards for billboard advertising

The commissioner of highways shall prescribe by regulations reasonable standards for the advertising devices hereinafter enumerated, designed to protect the safety of the users of the highways and otherwise to achieve the objectives set forth in KRS 177.850, and the erection and

maintenance of any of the following advertising devices, if they comply with such regulations, shall not be deemed a violation of KRS 177.830 to 177.890:

(1) An advertising device which is to be erected or maintained on property for the purpose of setting forth or indicating:

(a) The name and address of the owner, lessee or occupant of such property; or

(b) The name or type of business or profession conducted on such property; or

(c) Information required or authorized by law to be posted or displayed thereon.

(2) An advertising device which is not visible from any traveled portion of the highway;

(3) An advertising device indicating the sale or leasing of the property upon which it is placed;

(4) Advertising devices which otherwise comply with the applicable zoning ordinances and regulations of any county or city, and which are to be located in a commercially or industrially developed area, in which the commissioner of highways determines, in exercise of his sound discretion, that the location of such advertising devices is compatible with the safety and convenience of the traveling public.

HISTORY: 1960 c 175, § 4, eff. 6-16-60

Penalty, 177.990(2)

Cross References

Validity of regulations restricting height of free standing advertising signs. 56 ALR 3d 1207

177.863 Highway advertising devices, what prohibited; spacing; size; illumination

Within any commercial or industrial zone or unzoned commercial or industrial area adjacent to a federal-aid

primary highway, advertising devices shall be subject to the followig standards:

(1) Prohibited advertising devices:

(a) Advertising devices that are not clean and in good repair.

(b) Advertising devices that are not securely affixed to a substantial structure.

(c) Advertising devices which attempt or appear to attempt to direct the movement of traffic or which interfere with, imitate or resemble any official traffic sign, signal or device.

(d) Advertising devices which obstruct the view of official signs, or approaching and merging traffic.

(e) Advertising devices on trees, or painted upon natural features.

(f) Advertising devices exceeding 1,250 square feet on each face including border and trim, but excluding supports.

(g) Advertising devices advertising an activity that is illegal under state or federal law.

(h) Obsolete advertising devices.

(2) Spacing of advertising devices:

(a) No advertising device structure designed to be primarily viewed from a non-limited access federal-aid primary highway shall be erected within 300 feet of any other such advertising device structure on the same side of the highway, unless separated by a building, natural obstruction or roadway. Provided, however, that in an incorporated municipality such required distance shall be reduced to 100 feet.

(b) Double-faced—V-type and/or back-to-back advertising device structures shall be one advertising device for spacing purposes.

(c) The minimum distance between advertising devices shall be measured along the nearest edge of the pavement between points directly opposite the advertising devices.

(d) Advertising devices advertising the sale or lease of the property on which they are located, or advertising the activity conducted thereon, are permitted, and shall not cause any other advertising device to be in violation of this chapter; notwithstanding any contrary provision.

(3) Size of advertising devices:

(a) The maximum area for any advertising device shall be 1,250 square feet, including border and trim but excluding supports.

(b) An advertising device structure may contain one (1) or two (2) advertisements per facing, not to exceed the maximum area.

(c) Double faced structures will be permitted with the maximum area being allowed for each facing.

(4) Lighting of advertising devices:

Advertising devices may be illuminated, subject to the following restrictions:

(a) Advertising devices which contain, include or are illuminated by any flashing, intermittent, or moving light or lights are prohibited, except those giving public service information such as time, date, temperature, weather, or similar information.

(b) Advertising devices which are not effectively shielded as to prevent beams or rays of light from being directed at any portion of the traveled way of the highway which are of such intensity or brilliance as to cause glare or to impair the vision of the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle are prohibited.

(c) No advertising device shall be so illuminated that it interferes with the effectiveness of or obscures an official traffic sign, device or signal.

HISTORY: 1968 S 367, § 2, eff. 6-13-68

1966 c 76, § 4

Penalty, 177.990(2)

Cross References

Validity of regulations restricting height of free standing advertising signs. 56 ALR 3d 1207

414 SW(2d) 573 (1967), Southeastern Displays, Inc. v. Ward. The delegation of power to the commissioner of highways to adopt regulations is not an unconstitutional delegation of power.

414 SW(2d) 573 (1967), Southeastern Displays, Inc. v. Ward. KRS 177.863 does not relate to the national system of interstate and defense highways.

177.867 Acquisition of billboards by state; compensation

(1) The commissioner of highways is authorized to acquire by purchase, gift, or condemnation pursuant to the Eminent Domain Act of Kentucky and shall pay just compensation upon the removal of the following advertising devices:

(a) Those lawfully in existence on October 22, 1965;

(b) Those lawfully on any highway designated a part of the interstate or federal-aid primary system on or after October 22, 1965, and before January 1, 1968;

(c) Those lawfully erected on or after January 1, 1968; and

(d) Those lawfully in existence on January 1, 1976.

(2) Compensation shall be paid for the following:

(a) The taking from the owner of any such advertising

device of all right, title, leasehold, and interest in such advertising device; and

(b) The taking from the owner of the real property on which the advertising device is located, of the right to erect and maintain such advertising devices thereon.

HISTORY: 1976 H 321, § 4, eff. 3-29-76; H 93, § 77, eff. 6-19-76

1968 S 367, § 3; 1966 c 76, § 5

Cross References

Eminent Domain Act, 416.540 et seq.

177.870 Violations declared a public nuisance

Any advertising device erected, maintained, replaced, relocated, repaired or restored in violation of KRS 177.830 to 177.890 is hereby declared to be, and is, a public nuisance and such device may without notice be abated and removed by any officer or employee of the state bureau of highways or upon request of the commissioner by any peace officer.

HISTORY: 1960 c 175, § 5, eff. 6-16-60

Penalty, 177.990(2)

177.880 Construction of KRS 177.830 to 177.890

Nothing in KRS 177.830 to 177.890 shall be construed to abrogate or affect the provisions of any municipal ordinance, regulation or resolution which is more restrictive concerning advertising devices than the provisions of KRS 177.830 to 177.890 or of the regulations adopted hereunder.

HISTORY: 1960 c 175, § 6, eff. 6-16-60

177.890 Agreements with United States authorized

The commissioner of highways is hereby authorized to enter into agreements with the United States secretary of transportation for the purpose of carrying out the national policy of promoting the safety, convenience and enjoyment

of public travel and the free flow of interstate commerce and the protection of the public investment in the national system of interstate and defense highways and federal-aid primary highways within the Commonwealth.

HISTORY: 1968 S 367, § 4, eff. 6-13-68

1960 c 175, § 7

No. 87-732

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES E. WHEELER,
NORA WHEELER, and
SHARON K. MAY - - - - - Petitioners

versus

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Louisville, Kentucky 40233
(502) 367-6411
Counsel for Respondent

December 1, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the Kentucky Billboard Act (KRS §§177.830-177.890) and implementing regulations (603 K.A.R. 3:010) violate the First and Fourteenth Amendment freedom of expression of individuals who use billboards to communicate political and religious beliefs.

2. Whether the Kentucky Billboard Act and implementing regulations violate the Fourteenth Amendment right to equal protection of the laws of individuals who use billboards to communicate political and religious beliefs.

3. Whether the decision below conflicts with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L.Ed. 2d 800, 101 S. Ct. 2882 (1981).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

JAMES E. WHEELER,
NORA WHEELER, and
SHARON K. MAY - - - - - *Petitioners*

v.

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, the Commissioner of Highways of the Commonwealth of Kentucky respectfully prays that the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 22, 1987, be denied.

OPINIONS BELOW

On March 7, 1986 the United State Magistrate for the District Court rendered its decision in which the Court invalidated the Kentucky billboard statute and

regulations, concluding that they are violative of the Wheelers' right to freedom of expression under the First Amendment to the United States Constitution. A copy of the District Court's opinion appears in the Appendix A to the Petition for a Writ. (Hereafter: Pet. and page number). The opinion of the Court of Appeals also appears in that Appendix.

JURISDICTION

The Respondent, does not contest jurisdiction.

COUNTER STATEMENT OF THE CASE

Petitioners James E. Wheeler, Nora Wheeler and Sharon K. May are Kentucky residents who were denied permission in 1974 to erect a billboard on which they wished to communicate their political and religious ideas. (R. 186: *Nora Wheeler,* at T.R. 63-64; Sharon Kay May at T.R. 166-168). The site is located about 1000 feet south of the Jefferson County/Bullitt County line in Bullitt County, Kentucky one foot from the right of way fence of Interstate Highway Sixty-five (I-65). (R. 186, James E. Wheeler, T.R. 15) James and Nora Wheeler had been leasing the sign since 1964 for one dollar ($1.00) per year.

This action was brought by Petitioners in Federal District Court pursuant to 42 U.S.C. §1983 alleging denial of their rights to freedom of expression secured to them under the First and Fourteenth Amendments, United States Constitution and seeking a declaratory judgment under 28 U.S.C. §2201 that Kentucky Re-

vised Statute 177.841 and Kentucky Administrative Regulation 603 KAR 3:010* unconstitutionally deprive them of freedom of expression. The Wheelers further sought permanent injunctive relief prohibiting the Commissioner of Highways of the Commonwealth of Kentucky (hereafter Commissioner) from enforcing the challenged statute and regulation, as well as monetary damages arising from the violation of their constitutional rights.

The U.S. Magistrate granted summary judgment in favor of the Wheelers on October 25, 1982. (R. 120: Summary Judgment). He declared KRS 177.841 and 603 KAR 3:010* to be unconstitutional in violation of the Wheeler's First and Fourteenth Amendment Rights. The Commissioner appealed the judgment to the United States Court of Appeals for the Sixth Circuit, which remanded the action to determine the actual effect of the Kentucky billboard statutes and regulations on the Wheeler's First Amendment rights and whether the effect of said statutes and regulations is the same or similar to the regulations invalidated in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490 (1981).

On remand the U.S. Magistrate rendered his decision in which the Court invalidated the Kentucky billboard statute and regulations, concluding that they were void on their face in that they violate the First Amendment to the United States Constitution. He

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*Note: The U.S. Magistrate did not consider the validity of 603 KAR 3:020 which only applies to Federal Aid Primary Roads.

found that under the statute and regulations, signs advertising commercial activities would be allowed on the property but signs conveying many non-commercial messages (particularly those of religious, ideological, or political nature such as "Abortion is Murder," "Save the Whales" and "No Nukes") would not be permitted.

The Commissioner appealed to the Sixth Circuit. The Court reversed the judgment of the District Court. It ruled that the Billboard Act and regulations are content neutral, narrowly tailored to serve substantial state interests, and do not effectively deny the First and Fourteenth Amendment rights of the Wheelers. A copy of the decision of the Circuit Court is attached in the Appendix (Pet. 2a).

REASONS FOR NOT GRANTING THE WRIT

1. The Case Does Not Involve Important Unresolved Issues of the First and Fourteenth Amendment Rights of Freedom of Expression for Individuals Using Billboards for the Communication of Political and Religious Beliefs.

After a trial which was the culmination of twelve years of litigation, the United States Magistrate for the District Court for the Eastern District of Kentucky held that portions of Kentucky's statutes and administrative regulations are constitutionally defective "on their face" (Pet. App. p. 27a) and prohibit the utilization of the only media financially available to the Plaintiffs to communicate their views to large numbers of their fellow citizens. The District Court

Magistrate also found that the statutes and regulations in question "make distinctions based on the content of signs" and hence offended the Constitution of the United States,[1] even though the only criterion was that the message must advertise an on-site *activity*.

The Circuit Court held that the Kentucky Billboard Act, Ky. Rev. Stat. Ann. §§177.830-177.890 (Baldwin 1985)[2] and the Kentucky regulations implementing this statute, 603 Ky. Admin. Regs. 3:010 (1975)[3] are content neutral, narrowly tailored to serve substantial state interests and not unconstitutional.[4]

The facts set forth in the record clearly demonstrate that the statutes and regulations as applied regulate messages only insofar as necessary to determine if they relate to an on-premise *activity*. The statutes empower state authorities to distinguish between various communicative interests in the area of non-commercial speech and commercial speech only on the strictly neutral basis of whether it relates to an on-premise *activity*.

603 KAR 3:020 cited by Petitioners (Pet. p. 5) applies only to Federal Aid Primary (FAP) roads (Pet. p. 41a) and was never at issue in this case because the Wheeler billboard is on an interstate highway

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[1]See District Court Memorandum Opinion at Appendix B, Pet. p. 25a.

[2]The relevant Kentucky statutes are set forth in Appendix B, Pet. p. 60a.

[3]The relevant Kentucky administration regulations are set forth in Appendix C, Pet. p. 30a.

[4]See Appeals Court Decision at Appendix A, Pet. p. 2a.

and the controlling regulation is 603 KAR 3:010 (U.S. Dist. Ct., Pet. p. 25a)

Likewise, the Petitioners quote from the testimony of George Lovell (Pet. p. 5) only when he was discussing the aforesaid irrelevant regulation. Furthermore, how Lovell interprets the law is not at issue since the statutes and regulations speak for themselves and the U. S. Magistrate held they were unconstitutional on their face.

603 KAR 3:010, §2(3) defines "on-premise" advertising device as those devices that contain "a message *relating to* an *activity* or the sale of a product on the property on which they are located." Political, ideological, and religious messages such as "NO NUKES," "ABORTION IS MURDER," and "SAVE THE WHALES" are permitted if they can be related to on-premise activities, such as a meeting about those subjects.

The Petitioners quote two State employees (Pet. pp. 6 & 7) and then attempt to argue from this (bits of Lovell's testimony and the Petitioners' version of what an employee supposedly said) that "such conduct on the part of State officials violates the First and Fourteenth Amendment rights of the Wheelers to freedom of Expression." (Pet. p. 7).

The U.S. Magistrate made no such findings. Instead, he obviated the necessity of his making any findings by concluding:

". . . the Kentucky Billboard Act and regulations promulgated thereunder are unconstitutional on their face." (Pet. App. 27a).

Petitioners, also contend, the restrictions on non-commercial speech of the Kentucky statutes and regulations are *not* valid time, place, and manner restrictions because they regulate the *content* of the signs. (Pet. p. 7) However, the Petitioners do not cite any Kentucky statute or regulation that regulates *content,* because there is no such statute or regulation.

2. The Case Does Not Involve Important Unresolved Issues Concerning the Fourteenth Amendment Right to Equal Protection of the Laws for Individuals Holding Certain Political and Religious Beliefs.

In arguing the converse of the above, the Petitioners reiterate their previous argument that two State employees said the State was refusing to grant a permit due to the content of their proposed messages and personal antipathy. To which we repeat that the United States Magistrate made no such findings, presumably because he knew a detailed analysis of the record would not support them.

Then Petitioners added that the record showed they were too poor to use other media, but Mr. Wheeler testified that he has a net income of $514 every two weeks and owns his own house (R 186, James E. Wheeler, TR 26). Furthermore, the Wheelers do have another billboard on I-65 at Ormsby Street on a lot which he himself owns, zoned commercial before September 21, 1959, but rezoned residential (R 186 J. E. Wheeler, TR 33).

Mr. Wheeler bought the lot at I-65 and Ormsby Street for $1200. He estimated it cost $1000 for the

material. The sign painting and labor were donated (R 186 J. E. Wheeler, TR 37). He lets his friends put messages on this billboard, if he agrees with the messages. The first message was his own inspiration, "It had a . . . hammer and sickle on it, and it said, 'warning, we're approaching a Gestapo police state . . . . forced busing, rotten courts . . .' " (R 186, J. E. Wheeler, TR 38). Mr. Wheeler described his billboard at I-65 and Ormsby Street as having six poles, each forty feet long, with a face that is twelve feet by forty feet. He testified that it was a bigger sign than his Bullitt County sign and at a better location. Other messages he's allowed on it have been: ". . . keep the Ten Commandments, remove Steve Beshear . . ." (the Kentucky Attorney General who had given an opinion that it was illegal to post them in schools), an anti-abortion message, an anti-vehicle emissions test message, and ". . . shame on you, Martha Lane" (the Kentucky governor (R 186, J. E. Wheeler TR 42). Mr. Wheeler never has checked to see what it would cost to rent a big billboard 660 feet back from the right of way (R 186, J. E. Wheeler TR 44).

Mr. Wheeler has never even asked a TV station if he could have a message on their public service time and does not believe he ever will. He has had announcements on the radio, and he has had letters to the editors published. But as Mr. Wheeler testified: ". . . but the thing about it, I'm not really so much interested in public service messages, point of view letters, what I am interested in is a Constitutional ruling on whether this sign that we're litigating is within the Constitu-

tional limits, whether my sign with a free speech message is outlawed and a commercial message is (sic); I want to know those things and it's been twenty years that I've been trying. I'm not interested in radio, TV, renting billboards back 660 feet, those things are immaterial to me." (R 186, J. E. Wheeler TR 44-45).

So we see that lack of funds has not kept the Wheelers from using other media, or legal locations for a billboard. Lack of interest (and love of litigation) have kept the Wheelers—Mr. Wheeler in particular—trying the same case over and over for the last twenty years.

3. The Case Does Not Involve an Important Direct and Unresolved Conflict With the Decision of The United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

The decision of the Circuit Court below does not conflict with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). In *Metromedia,* the City of San Diego adopted an ordinance governing outdoor advertising. The ordinance permitted onsite commercial advertising but prohibited other commercial advertising and non-commercial communications using fixed structure signs (i.e. billboards), unless permitted by one of 12 specified exceptions. The exceptions included government signs; religious symbols; temporary political campaign signs and others. (453 U. S. at 495-496) The Court described the effect of the ordinance:

> . . . (T)he occupant of property may advertise his own goods and services; he may not advertise the goods or services of others, nor may he display most non-commercial messages. (453 U. S. at 503).

The effect of the ordinance was to discriminate against non-commercial speech by limiting it to twelve specific exceptions. Speaking for the plurality in *Metromedia,* Justice White cited the case of *John Donnelly and Sons* v. *Campbell,* 639 F. 2d 6 (1980), aff'd. 453 U. S. 916 (1981), with approval and stated as follows (453 U. S. 513 at footnote 18):

> That court took a position very similar to the one we take today: It sustained the regulation insofar as it restricted commercial advertising, but held unconstitutional its more intrusive restrictions on non-commercial speech. The court stated: "The law thus impacts more heavily on ideological and non-commercial speech—a peculiar inversion of First Amendment values. The statute . . . provides greater restrictions—and fewer alternatives, the other side of the coin—for ideological than for commercial speech . . . In short, the statutes' impositions are both legally and practically the most burdensome on ideological speech where they should be the least.

The Kentucky statutes and regulations are not the same as the San Diego ordinance in *Metromedia.* The Kentucky laws only have one criterion that applies equally to commercial and non-commercial messages—they must relate to an on-premise *activity.*

The United States Court of Appeals for the Sixth Circuit correctly concluded (Decision filed June 22, 1987, No. 86-5423 at page 8, See Appendix, Pet. p. 10a):

> We believe that the Billboard Act and regulations are content neutral. They are not directed at the content of the messages but their secondary effects.

In arriving at the foregoing conclusion the U.S. Court of Appeals pointed out:

> The Supreme Court has recognized that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner. *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 425 U. S. 640 (1981). Expression, whether oral or written, is subject to reasonable time, place and manner restrictions. *Clark* v. *Community For Creative Non-Violence*, 468 U. S. 288, 293 (1984). Such restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and they leave open ample alternative channels for communication of the information. *Id. Accord Members of the City Council* v. *Taxpayers for Vincent*, 466 U. S. 789, 807 (1984); *Heffron*, 452 U. S. at 647-48 (Pet., 7a-8a).

The Circuit Court concluded that

> "the statute and regulations are valid place and manner restrictions." After discussing them in detail, the Circuit Court further concluded, ". . . the restrictions on the location of off-premises signs regulate the secondary effects, not the content of these signs." (Pet. 8a)

The Supreme Court has recently considered the validity of a restriction designed to regulate the secondary effects of protected speech. In *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), the Court considered a challenge to a zoning ordinance that prohibited adult theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The Court noted that the ordinance treated theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, the Court noted that the ordinance was not aimed at the content of the films shown, but rather at the secondary effects of such theaters on the nearby community. *Id.* at 929. Accordingly, the Court found that the ordinance was consistent with its definition of "content-neutral" speech because it was justified without reference to the content of the speech, and stated:

> The ordinance does not contravene the fundamental principal that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Id. at 929 (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U. S. 92, 95-96 (1972)).[6]

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[6]The *City of Renton* Court relied on *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), where the Court concluded that zoning ordinances designed to combat undesirable secondary effects of adult theatres are to be reviewed under the standards relating to

(Footnote Continued on Next Page)

In *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), the Court considered a rule promulgated by a public corporation that required all persons desiring to sell, exhibit, or distribute materials during the state fair to do so only from fixed locations. The Court concluded that the restriction was content neutral and a reasonable restriction on place and manner because it applied evenhandedly to all . . ." (Pet. 8a-9a).

The Circuit Court went on to observe,

> Furthermore, the on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property. In *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U. S. 85 (1977), the Court considered an ordinance that prohibited the posting of "For Sale" signs or "Sold" signs because the township sought to abate the flight of white homeowners from a ra-

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(Footnote Continued From Preceding Page)

content neutral time, place, and manner regulations. The Court held that the City of Detroit could distinguish between adult theatres and other kinds of theatres because it was not regulating the dissemination of "offensive" speech. *Id.* at 71.

cially integrated community. The ordinance did not prohibit other types of signs. The Court found the ordinance unconstitutional because the township enacted the ordinance to prevent its residents from obtaining certain information. *Id.* at 96.

In view of all the foregoing it is obvious that there is no conflict between the decision of the Circuit Court in this action and that of the United States Supreme Court in *Metromedia, supra.*

CONCLUSION

A writ of certiorari should not be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES E. WHEELER,
NORA WHEELER, and
SHARON K. MAY - - - - - - - *Petitioners*

v.

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - - *Respondent*

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 1987, three copies of the Brief in Opposition to Petition for Writ of Certiorari each were mailed postage prepaid to Theodore H. Amshoff, Jr., and Richard L. Masters of Amshoff, Amshoff & Searcy, 1012 S. Fourth Street, P. O. Box 2848, Louisville, Kentucky 40201 and Lewis G. Benham, 310 W. Liberty Street, Louisville, Kentucky 40202, Counsel for Petitioners; Richard K. Willard, Assistant Attorney General, Louis G. De Falaise, United States Attorney, John F. Cordes, John F. Daly, Attorneys, Appellate Staff Civil Division, Room 3631, Department of Justice, Washington D.C. 20530; and Bert T. Combs, Sheryl G. Snyder, William H. Hollander, Wyatt, Tarrant, and Combs, Counsel for Outdoor Advertising Association of Kentucky, Incorporated, Citizens Plaza, Louisville, Kentucky 40202. I further

certify that all parties required to be served have been served.

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